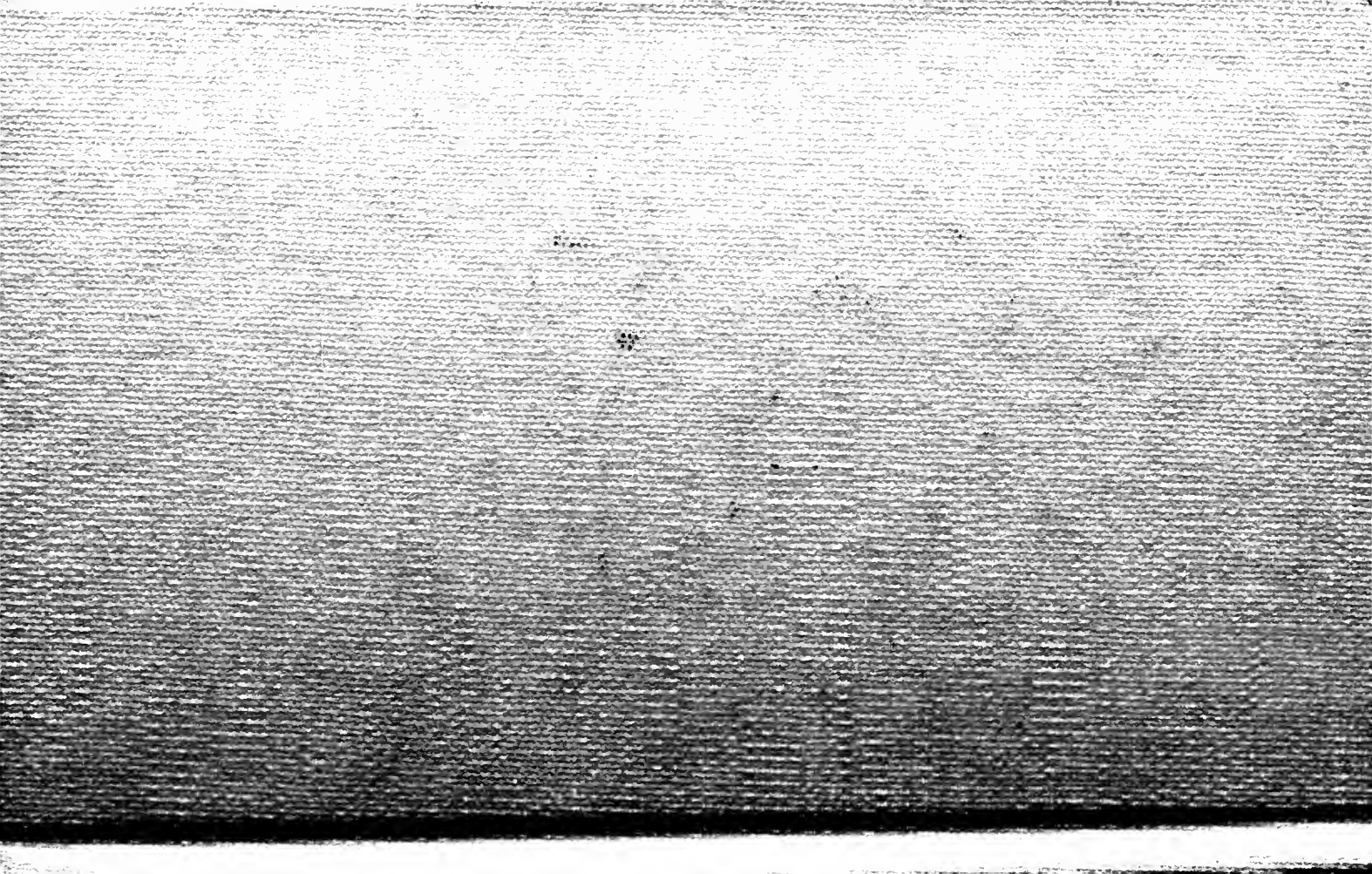

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ILLINOIS STATE UNIVERSITY

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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

By NORMAN L. FREEMAN,
COUNSELOR AT LAW.

VOLUME XXXVII.

CONTAINING A PART OF THE CASES DECIDED AT THE APRIL TERM, 1865.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

Hon. PINKNEY H. WALKER, Chief Justice.

Hon. SIDNEY BREESE,
Hon. CHARLES B. LAWRENCE, } Justices.

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PROCEEDINGS

UPON THE

DEATH OF ABRAHAM LINCOLN,

HAD IN THE

SUPREME COURT OF ILLINOIS,

AT THE

APRIL TERM, 1865, AT OTTAWA.

Wednesday, the 3d day of May, 1865, being the day appointed at a recent meeting of the Bar, for the presentation of the resolutions passed by them, expressive of their affection and respect for the lamented late Chief Magistrate, at an early hour the Court Room was filled by ladies and gentlemen to witness the solemn and impressive proceedings.

The Court Room and interior of the building were draped in mourning, and over the bench was suspended a portrait of the late President, enwreathed in evergreens and emblems of grief.

At eleven o'clock, the court met, the full bench being present—the Hon. P. H. WALKER, Chief Justice; Hon. SIDNEY BREESE and Hon. CHAS. B. LAWRENCE, Justices.

The court being opened, the Hon. J. D. Caton, formerly Chief Justice, rose and addressed it as follows:

May it please your Honors:

The solemn duty has been assigned me of formally announcing to this court the death of ABRAHAM LINCOLN, and to present to the court the resolutions which the Bar has adopted expressive of our appreciation of [*12] the deceased, and of our bereavement at his loss, and to ask that they be spread upon the records of the court.

These are the resolutions of the Bar:

"Being assembled to express our grief for the sudden death of the President of the Republic, to mourn for the loss of an eminent member of our profession, and to pay a merited tribute of respect to the memory of Abraham Lincoln, we, his brethren of the Bar, do

"*Resolve*, 1*st*. That we deeply deplore the irreparable loss which the Nation has sustained in this trying hour of its history, by the melancholy death of its distinguished Chief Magistrate. That it is with the most profound sorrow that we part with a brother member of the Bar who has so long occupied an exalted position among us—one whose great ability, unblemished integrity and kind and genial nature have commanded so much of the respect, admiration and love of our profession, and that with the most sincere grief we mourn for the death of one whose inestimable social qualities have so endeared him to us as a man.

"2*d*. That a copy of these resolutions be presented to the Supreme Court of the State of Illinois, now in session, with a request that they be spread upon its records, and that a copy be sent to the Secretary of State of the United States, and another copy to the family of the deceased; and that, to the members of his family we tender our heartfelt sympathy in their sad affliction, and our kindest and best wishes for their future prosperity."

In the performance of the sad duty, both precedent and propriety will justify me in adding a few words, though but a few, to what is expressed in these resolutions. In any other position I might be permitted to speak of Mr. Lincoln as he is known to every inhabitant of this broad land, and as he will be known in history in all future time—as President of the United States.

Little more than four years ago, he was, by the voice of the American people, taken from among us at the Bar and placed over this great Nation. In administering the affairs of this Government, he has, undoubtedly, displayed a very high order of ability.

At the very commencement of his administration, a great rebellion broke out, and presented the question whether the light of this republic, which had for a few years shone so brightly, was but the brilliant flash of a meteor to illuminate the political horizon of a civilized world for but a moment, and then go out in darkness, or was the fixed shining of a luminary which should point out to future ages the pathway to liberty, prosperity and happiness.

With the aid of great men, whose names history will write on the same page with his own, and with the support of a patriotic people, he had put down the rebellion, and already saw the angel of peace arising "with healing in his wings," to bless his native land, when he was struck down by an assassin's hand. He is mourned by a whole Nation as few have been mourned before
[*13] him. But to others we must leave the pleasing task of speaking of him as the chosen ruler of the Nation. While poets sing his praises, and orators proclaim his greatness as a public man, it becomes us, his professional brethren, who knew him better than strangers could know him, to speak of him as we knew him in his profession.

For nearly thirty years was Mr. Lincoln a member of this bar. But few of us are left who preceded him. From a very early period he assumed a high position in his profession. Without the advantage of that mental culture which is afforded by a classical education, he learned the law as a science. Nature endowed him with a philosophical mind, and he learned and appreciated the elementary principles of the law, and the reasons why they had become established as such. He remembered well what he read, because he fully comprehended it. He understood the relations of things, and hence his deductions were rarely wrong from any given state of facts. So he applied the principles of the law to the transactions of men, with great clearness and precision. He was a close reasoner. He reasoned by analogy, and usually enforced his views by apt illustrations. His mode of speaking was generally of a plain and unimpassioned character, and yet he was the author of some of the most beautiful and eloquent passages in our language, which if collected together would form a valuable contribution to American literature. Those who suppose Mr. Lincoln was destitute of imagination or fancy know but little of his mental endowments. In truth, his mind overflowed with pleasing imagery.

His great reputation for integrity was well deserved. The most punctilious honor ever marked his professional and private life. He seemed entirely ignorant of the art of deception or of dissimulation. His frankness and candor were two great elements in his character which contributed to his professional success. If he discovered a weak point in his cause he frankly admitted it, and thereby prepared the mind to accept the more readily his mode of avoiding it.

I venture the assertion, that no one ever accused him of taking an underhanded or unfair advantage in the whole course of his professional career. He was equally potent before the jury as with the court.

His personal characteristics were of the most pleasing kind. His heart was full of benevolence, and he was ever prone to put the most favorable construction upon the frailties of his fellow men. His hand was open to relieve the unfortunate, and his efforts were at the service of those in distress. By his genial nature he enlivened every circle of which he was a member, where he was ever welcome. Who of this bar does not remember him as of yesterday, when he was among us, relieving the hard labors of the profession by his
[*14] enlivening presence? He will ever be remembered as one of our brightest ornaments, whose practice reflected honor upon the profession. If these elements of character inspired love for him as a professional brother, how

much must they have endeared him to his own domestic circle—around his own fireside? If we feel his loss as irreparable, where but in God can be found the consolation for his loss as a husband and a father? Those bereaved ones may well look to us who next to themselves knew him best of all, for that deep and abiding sympathy which tends to soften the most poignant grief; and they will not look in vain. Nor to his professional brethren alone may they look for sympathy. With them and us a Nation mourns his untimely end.

I may say, without the least exaggeration, that humanity and civilization throughout the world will feel the shock which has draped our Nation in the habiliments of woe.

I move the court that the resolutions of the bar be spread upon its records, that those who come after us may read our appreciation of our departed brother, and that a copy of the record, under the seal of the court, be furnished to the family of the deceased, that they may know of the deep sympathy we feel for them in their great bereavement, and that a like copy be furnished to the Secretary of State of the United States, that all may read the testimony borne by the professional brethren of Abraham Lincoln.

Judge Caton then presented the resolutions to the court; whereupon Mr. Justice BREESE, on behalf of the court, responded as follows:

In responding to the resolutions just presented by the late distinguished Chief Justice of this court, I am instructed to say they meet our most cordial concurrence. They will be entered on the records of the court, there to remain as a tribute, slight it may be, yet sincere, in honor and to the memory of one who not only adorned this bar, but rose from it, without any intermediate step, directly to the highest office in the gift of a great and free people.

He whose loss we all so sincerely deplore, for whom, throughout this broad land, solemn pageants are in mournful progress, for whom court rooms, halls and public edifices are draped in funereal emblems, testifying to a Nation's grief, was, but a few short years ago, an unassuming, yet distinguished citizen of this State, in full practice at the bar of this court, struggling earnestly with his competitors in an arena whose honors and whose triumphs he so often won.

In common with you, gentlemen, we deeply deplore the loss of Mr. Lincoln. We have always regarded the illustrious deceased as a man of the highest order of intellect—in sheer natural endowments, with few superiors,—as [*15] one with blemishes as few and as slight as attach to the most perfect humanity, and as a statesman of no common order. But it becomes us, on this mournful occasion, to speak of him only as a man and as a lawyer—as a member of an honorable profession, from whose ranks have been taken, in times of the greatest emergency, men whose high destiny it has been not only to guide the car of victory, but to sustain the weight of empire.

As a man, then, and as a lawyer, Mr. Lincoln challenged admiration not more for his exalted talents than for his noble, unselfish, sympathizing nature, giving to all his other estimable qualities their greatest charm.

Mr. Lincoln possessed not only great common sense—a thorough knowledge of men, for which he was indebted, perhaps, to his early training, and to the vicissitudes of his career; but a generous sympathy in the sorrows, troubles, and difficulties that enter into the great battle of life. In this battle he mingled fearlessly, partaking of its violent struggles, its cruel disappointments, its humbling reverses.

Not deeply read in his profession, Mr. Lincoln was never found deficient in all the knowledge requisite to present the strong points of his case to the best advantage, and by his searching analysis make clear the most intricate controversy.

He was, besides, an honest lawyer, practising none of the chicanery of the profession to which he was devoted, nor any of those mean and little and shuffling and dishonorable arts all do not avoid; nor did he seek an advantage over his adversary to which he was not fairly entitled, by the merits of his cause, and by the force of his arguments. With an exterior by no means polished, with nothing in the outward man to captivate, there was that within him, glowing in his mind, which enabled him to impress by the force of his logic, his own clear

perceptions upon the minds of those he sought to influence. He was therefore, a successful lawyer, but bore with humility the distinction he had won.

For my single self, I have, for a quarter of a century, regarded Mr. Lincoln as the fairest lawyer I ever knew, and of a professional bearing so high-toned and honorable, as justly, and without derogating from the claims of others, entitling him to be presented to the profession as a model well worthy of the closest imitation.

His enthusiasm, his simplicity, humor, and that freshness of mind, which his unpretending life and habits gave him, won the esteem of all, and these qualities were not dimmed on attaining the distinguished position to which his
[*16] admiring countrymen advanced him. In that, as in the more humble walks of his life and homely social intercourse, his energy, his respect, his kindly humor, were still seen and felt; and though a melancholy tinge seemed to pervade his countenance when in repose, no sooner was it lighted up by that sunny smile, ever ready to play upon it, than the whole man was changed, and one more genial, frank and entertaining was rarely to be found.

Nor did he, in these exhibitions of the native goodness of his disposition, lessen the dignity of his high office; they but served to shed a soft beauty around it, showing that his heart was in kindliest sympathy with the world without, and gave to his allegories and his anecdotes in which he delighted to indulge, a point and pungency quite as effective in illustrating a proposition as the most powerful argument.

In his public life, Mr. Lincoln seemed to have been inspired by high principle, manifesting at all times an abiding sense of solemn responsibility, and exerting all his influence for good, as it appeared to him from his stand-point, to be best attained.

Though many of us differed with him in his views of public policy, all admitted the honesty of his intentions, and cherished an abiding faith in his patriotism, and in his sincere desire to lift the country out of the troubles into which wicked men had involved it.

From the day of his first inauguration, Mr. Lincoln never despaired of the final success of the great cause in which we had embarked, and his determination that he would, as the head of the Government, "hold, possess and occupy," the fortifications and other property, of which the Union had been despoiled, was on the point of accomplishment when he was so suddenly stricken down. In his inaugural, he prophesied, all our people would be again united, and harmony once more prevail; for thus he spoke:

"The mystic chords of memory, stretching from every battle-field and patriot grave, to every living heart and hearth-stone all over this broad land, will yet swell the chorus of the Union, when touched again, as they surely will be, by the better angels of our nature."

What a beautiful thought, and how beautifully expressed!

Why could he not have lived to witness this, his bright anticipation?

Why was he thus stricken down, that he should not enjoy the realization of this, his cherished hope?

Why was he not reserved to join in that chorus, so soon, we trust, to swell from the mystic chords the better angels of our nature have surely touched, attuning them to union, harmony and love? And the more especially as the great drama in which he had borne a part so conspicuous, was about to
[*17] close; and when, at its closing, those peculiar faculties he possessed—his universal kindness, his broad sympathies, his gentleness, his love of his fellow man, his conciliatory and forgiving nature, would have been brought into play, to produce, under the providence of God, results the most benign, stamping him in all future time, if not the Father, as the Great Restorer of the Union of the country, and the preserver of its most cherished institutions. It has been truly said, that names become beacons in the stream of time—signal lights, bright or lurid, as may be, which the flow of ages cannot extinguish. Whose name, had he survived the assassin's pistol, stood a fairer chance than his to become that beacon—to be that signal light, beaming in bright effulgence over the world forever? As it is, gone down as he has, into silence, without

accomplishing all he desired for his country, his honored name will be echoed this side the grave "to the last syllable of recorded time."

The critical conjunctures in which Mr. Lincoln has been placed have no parallel in our history, and throughout all of them "he has borne his faculties so meekly," that "his virtues plead like angels trumpet-tongu'd against the deep damnation of his taking off."

In the death of Mr. Lincoln, the world has lost a man of the most unbounded philanthropy—the Union a most devoted friend, unwearying in his efforts to restore it to its pristine glory—this noble State its foremost citizen, whom all delighted to honor—society one of its most exemplary members. From our professional circle, we grieve to know one of its brightest gems has dropp'd away. We are powerless to restore it to its setting, but we will ever remember its brilliancy, and never cease to admire the unsullied purity of its nature.

After the response of Mr. Justice BREESE, the Chief Justice remarked that in view of the final ceremonies to take place on to-morrow, upon the interment of the remains of our late Chief Magistrate, at the State capital, and as further mark of respect to his memory, the court would adjourn until Friday, at 9 o'clock.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, 1865.

WILLIAM LUNN *et al.*
v.
GEORGE W. GAGE.

1. LEASE—*covenants for repairs—how construed.* Where a lessor, for a term of five years, covenants to paint the building, to erect a stable, and lay a side track leading to a cattle yard, connected with the hotel, and no time is specified when such repairs shall be made, the law will presume that it was to be done for the benefit of the lessee, and in a reasonable time.

2. COVENANTS—*construction.* The true rule of construing covenants, is to hold them dependent or independent, according to the intention of the parties. And where a covenant seems to be dependent, if the parties act under it so as to render it clear that they regarded them as independent, such action affords a means of ascertaining their intention, when they were entered into by the parties.

3. RENTS—*recovery of, and recoupment of damages.* Where a tenant entered into possession, under such a lease, and occupied the premises for several months, and the landlord failed to make the repairs, the tenant, after abandoning the occupancy of the property, will be liable for the rents for the time, at the rate agreed upon; but if he has suffered loss by reason of the [*20] landlord failing to repair, in a reasonable time, the tenant may recoup such damages against the rents.

APPEAL from the Superior Court of Chicago.

This was an action of covenant brought by George W. Gage, in the Superior Court of Chicago, against William Lunn and William H. Lunn, for the recovery of rent claimed to be due, under a lease, for a hotel and its appurtenances in Chicago. The plaintiff counted upon a lease given by plaintiff to defendants, which contained in substance these provisions:

"To have and to hold the said above described premises, with the appurtenances, unto the said parties of the second part, their executors, administrators and assigns, from the 1st day of April, A. D. 1861, for and during and until the 1st day of April, A. D. 1866. And the said defendants covenanted and agreed therein, with the said plaintiff, to pay him as rent for the said premises,

the sum of one thousand dollars per year, in quarterly installments.

"And it was, and is further covenanted and agreed, in and by said indenture, that in case said defendants should keep and retain the said premises, for and during the said term, to wit: from the said 1st day of April, A. D. 1861, to the 1st day of April, A. D. 1866, that then, and in that case, the rent of said premises, so leased, should not commence until the 1st day of September, A. D. 1861; but that in case the said defendants should vacate the said premises on or before the 1st day of April, A. D. 1862, that then, and in that case, the rent of said premises was to commence on the 1st day of April, A. D. 1861, at the said rate of one thousand dollars per year."

It is averred that defendants left the premises before the 1st day of April, 1862, to wit: on or about the 15th day of November, 1861. And that, by means of their covenants, defendants became liable to pay plaintiff rent on the premises from the
[*21] 1st day of April, 1861, until the 15th day of November, 1861. And that the defendants, and each of them, have neglected to pay the rent, or any part thereof, to the plaintiff.

To the plaintiff's declaration, the plea of *non est factum* was filed; and a stipulation was entered into by the parties, that the defendants might, under the above plea, make all and each of the defenses and objections they could have done, if they had craved oyer, and set out said indenture of lease, and plead to the same; and also that upon the trial said defendants might, under the above plea, give any evidence which they could give, or would be admissible, under any well drawn pleas which they would be entitled to file in this cause.

A trial was had by the court and a jury; and the plaintiff introduced the lease which, among other covenants, contained these:

"To have and to hold the above described premises, with the appurtenances, unto the party of the second part, their executors, administrators and assigns, from the 1st day of April, in the year of our Lord one thousand eight hundred and sixty-one, for and during and until the 1st day of April, in the year eighteen hundred and sixty-six.

"And the party of the second part, in consideration of the leasing of the premises aforesaid, by the party of the first part to the party of the second part, does covenant and agree with the party of the first part, his heirs, executors, administrators and assigns, to pay the party of the first part, as rent for said demised premises, the sum of one thousand dollars per year, in quarterly installments.

"And the party of the second part further covenants with the

party of the first part, that the second party has received said demised premises in good order and condition, and that at the expiration of the time in this lease mentioned they will yield up the premises to the party of the first part, in as good condition as when the same were entered upon by the party of [*22] the second part, loss by fire or inevitable accident, or ordinary wear excepted.

"And it is further covenanted and agreed by and between said parties, that the party of the first part shall paint the outside of the house situated upon said premises, and known as the Brighton House; also to construct a suitable horse shed to occupy the position of the former one, and also to cause to be put down a side track upon said premises.

"It is further understood and agreed that in case the parties of the second part shall keep and retain the premises above mentioned for and during the term of five years from the 1st day of April, 1861, that then and in that case the rent of said premises so leased shall not commence until the 1st day of September, A. D. 1861. But in case the parties of the second part shall vacate the premises on or before the 1st day of April, A. D. 1862, that then and in that case the rent of said premises to commence on the 1st day of April, A. D. 1861, at the rate of $1,000 per year."

Plaintiff also introduced as a witness *John King*, who testified: I live in Brighton; the defendants vacated the Brighton House in the fall of 1861; it was after the State Fair; the Brighton House was used for a hotel; there were quite a number of cattle yards attached; there had been a horse shed there prior to 1861; there was no horse shed built there in 1861, and is none now; it was burned down in 1861; there was no railroad track to the cattle yards.

Defendants then called as a witness *James Michie*, who testified, as follows: I live in town of Lyons, and know the parties and the Brighton House; it was constructed for a drovers' hotel, and had a large number of cattle yards attached; there was no side track constructed for the hotel and cattle yards in 1861; there was no horse shed there; defendants went into the house in the spring of 1861, and furnished it for, and kept it as a hotel; I heard a conversation between the plaintiff and William H. Lunn, in the fall of 1861, after the State Fair; Lunn and myself went into the Tremont House to give the plaintiff the key [*23] to said Brighton House; Lunn told the plaintiff "he could not keep the premises, as there was no side track constructed there, nor any horse shed;" Mr. Gage replied, "there had been a side track;" Mr. Lunn remarked, "you have neglected to lay the track, and build the shed, although I notified you to do it; the track for the Fair was not on the Brighton House premises,

but was off on the other side of the road; Mr. Gage said, "a track had been laid;" Lunn replied, "what benefit is that to the house?" the hotel is constructed apparently to make a bull's head of it, at the forks of the Archer road and the plankroad; the house is of little use without the cattle yards; the defendants left because there was no horse shed, and no side track, and told the plaintiff so; a great many cattle passed over the Chicago, Alton and St. Louis Road; they could not be loaded, nor unloaded, without a side track at the yards; I have kept a hotel, and am acquainted with the business; a house like the Brighton House, without a horse shed and side track, would not be worth keeping; a great many cattle passed over that railroad in 1861; the hotel keepers get pay for yarding and keeping the cattle, and for boarding the men; the track to the Fair grounds was not so near to the Brighton House as the main track, and did not touch the premises; it was taken up again after the Fair; the Archer road and the plankroad lay between it and the Brighton House; Mr. Gage took the key when Lunn handed it to him.

The defendants then called *Daniel Christman*, who testified: in May, 1861, William H. Lunn asked Mr. Gage when he was going to build the side track and shed; the defendants furnished the Brighton House, put it in order and moved in in 1861; and put it in repair a few days before the Fair; they plastered and painted it inside; there was no horse shed built there in 1861; I lived 60 rods south of it.

Edward Brainbridge, Jr., was called, who testified: I know the Brighton House, and am a cattle drover; the most convenient yards for the Alton and St. Louis Railroad, in 1861, were at [*24] the Brighton House; am acquainted with the business of keeping a hotel at a bull's head; they charge 10 cents each for yarding, and $1.25 per week for keeping cattle, and $1.00 a day for boarding the men; a *side track must be constructed* from which an incline plane must lead into the yards; people would not patronize a house off from the yards; the house and premises without a side track, and place to unload the cattle, by an inclined plane leading into the yards, *is worth nothing;* drovers will not go there, nor patronize a house without a side track; this house, in 1861, was not patronized by drovers at all, nor is it now.

Simon Anderson testified: I went to live at the Brighton House December 25th, 1861; I took care of the house for the rent; the cattle yards are 120 yards west of the house; there are nine; no horse shed was built there in 1861, nor side track to the yards or house.

Patrick Brown testified: In 1861, I was foreman of tracklayers on the St. Louis Railroad; I laid the side track to the State Fair grounds; it took from four to six days; to lay a side track to

the Brighton House cattle yards would take twenty men about five days; the track I laid for the fair in no way went to the Brighton House or cattle yards.

They then called *Mr. Marrs*, who testified: The land about the Brighton House is smooth, level prairie; the plaintiff did not build a shed or lay a side track there in 1861; the railroad runs within 40 rods of the house; the house used to do a good business, but not much since the railroad was built; the house is a very large one; there is a good deal of travel on the road; it is not patronized like Myrick's or Ulich's, where they have side tracks; the horse shed would be a great advantage to the house.

After all of the evidence was introduced, the court, at the request of plaintiff, gave to the jury the following instructions:

1. Under the lease, the defendants had the right to vacate the premises the next day after they entered into possession, if they were dissatisfied therewith, or with the terms of the [*25] lease; and in such case, the plaintiff could only recover, at the rate of a thousand dollars a year, from the 1st day of April, 1861.

The written lease, introduced in evidence, fixes the rights of the parties. And if the jury believe, from the evidence, that the defendants vacated the premises, mentioned in the lease, on or about the 1st day of November, 1861, then the defendants are chargeable, under the lease, at the rate of a thousand dollars a year, from the 1st day of April, 1861, until they vacated the premises, together with interest, at the rate of six per cent., from the time the defendants vacated the premises; deducting therefrom the damages, if any, sustained by defendants for the failure of plaintiff to fulfill the covenants made by him, in said lease.

2. If the jury believe, from the evidence, that the defendants have not notified the plaintiff to make the improvements specified in the lease, prior to the time they vacated the premises, then under the evidence in this case, the jury may consider whether the defendants are entitled to any reduction of damages by way of recoupment or off-set.

At the request of defendants, the court gave these instructions:

1. And the jury are instructed, that on the question of damages, they must examine all the facts; and it is for them to say, from such facts, what damages the defendants have sustained.

2. If the jury believe, from the evidence, that plaintiff, on the premises leased to defendants, covenanted in his lease to erect a shed, paint the house, and build a side track, which he neglected to do, for an unreasonable time, and that for the want of said improvements, the defendants suffered damages, then the amount

of damages is a proper off-set to be allowed on the rent due. *And if it equalled or overrun the amount of rent due on the lease, the jury will find for the defendants.*

[*26] The court also gave other instructions for the defendant, but as they announce the same rule, or relate to matters not affecting the questions arising in the case, they are omitted.

The jury returned a verdict in favor of the plaintiff for two hundred and seventy-five dollars.

Defendants entered a motion for a new trial, which was overruled by the court, and they excepted; and the court rendered a judgment on the verdict.

To reverse which, they prosecute this appeal; and, amongst other things, assign the following errors:

1. The court erred in overruling the motion for a new trial.

2. The court erred in deciding that the building of a side track and shed by plaintiff were not conditions precedent.

3. The verdict and judgment should have been for defendants.

Messrs. GARRISON & BLANCHARD for appellants.

Messrs. KALES & WILLIAMS for appellee.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

Had appellant a right to abandon the contract and remove from the premises after taking possession, under the lease? The grounds relied upon are, that appellee had failed to erect a horse shed, a side track, or paint the house, according to his covenant in the lease. It is insisted that, without these improvements and repairs, the property was useless as a hotel, and of little or no value; but with the improvements, the house could have done a good business. The abandonment of the premises is sought to be justified upon the ground, that the performance of these covenants were conditions precedent, and a failure by the lessor to make them, released the lessees from their covenants.

The covenants referred to are these:

[*27] "And it is further covenanted and agreed by and between said parties, that the said party of the first part shall paint the outside of the house situated upon said premises, and known as the Brighton House; also to construct a suitable horse shed to occupy the position of the former one, and also to cause to be put down a side track upon said premises."

There is no time specified when these acts shall be performed, nor does it appear from the lease that they were to precede other acts to be performed by either of the parties. It will not be

doubted that the parties supposed that these improvements and repairs were necessary for the better enjoyment of the property for the purposes for which it had been designed. If necessary for the enjoyment of the property as a hotel, it must be intended that they were designed by the parties for the benefit of the lessee during the term. Nor can we, for this reason, suppose, that if it was only expected that it would be made at or near the end of the term, that these covenants would have been inserted in this lease. It was manifestly to enhance the value of the property as a hotel, during the term, that they were to be made, and if so, it would seem to follow, that it was designed they should be made at least in a reasonable time.

The true rule for construing covenants is stated in *Davis* v. *Wiley*, 3 Scam., 234. It is there said, that "covenants are to be construed to be dependent or independent, according to the intention of the parties, and the good sense of the case; and that technical words should give away to such intention." Testing these covenants by this rule, we must hold that they were mutual and dependent. And there being no stipulation that they were to be performed by appellee before appellants entered into possession under the lease, and as they were necessary to the more profitable enjoyment of the lease, and it was no doubt so understood by the parties, they should have been performed in a reasonable time, and if they were not, appellee had no right to recover. *Copps* v. *Smith*, 3 Scam., 177; *Baird* v. *Evans*, 20 Ill., 29. Again, [*28] in the case *Mecum* v. *The Peoria and Oquawka Railroad Co.*, 21 Ill., 553, it was held that "courts will not, and ought not to construe covenants and agreements, as independent, and still enforce a performance by the other party, unless there is no other mode of construing the instrument, and unless it clearly appears to have been the deliberate intention of the parties at the time the instrument was executed." In this case, there is nothing to show, or from which it can be inferred, that appellants should occupy the premises, at the stipulated rent, in the condition they were when leased, and that appellee should have the entire term within which to make the improvements.

It would be a more rational and natural construction to say that it was designed that they should be made before appellants entered. But they having gone in without insisting upon them as precedent, we must suppose that they were understood to be mutual, and to be performed in a reasonable time. To hold that appellee had the entire term to make the improvements and repairs would be so manifestly unjust, that we cannot imagine that the parties would deliberately enter into such an agreement. But if such was their purpose, they have failed to express it in the lease. Had appellee made the improvements before appellant abandoned the property,

it would have been in time, as that would have been the construction put upon the covenants by the parties themselves.

We said, in *Wright* v. *Lattin*, (decided at the present term,) that it may be, if the landlord covenants to repair before the term commences, and fails to do so, the tenant might refuse to enter upon the premises. But having entered under the lease, and received possession, he cannot abandon the lease, and refuse to pay rent, because of the breach of that or any other covenant, except for quiet enjoyment. If the landlord fails to repair, accord-
[*29] ing to his covenant, the tenant may recoup the amount of damages, thus sustained, from the rent, or he may sue upon the covenant.

It then follows, that as appellants entered upon the term, and enjoyed the premises from some time in the month of April, until in November, 1861, they became liable to pay rent for the time they thus occupied the premises. But they were also entitled to recoup all damages which they sustained by reason of the repairs not having been made by appellee. By appellee's second instruction, the jury were informed that such were their liability and their rights under the lease, and the jury seem to have acted under this instruction. Appellants seem to have been in possession for between six and seven months, yet the jury only found them liable to pay $275, less than half of the rent stipulated to be paid, by the terms of the lease. The jury could not have arrived at this conclusion had they not deducted the damages sustained by reason of the repairs not having been made, as they were authorized to do, under the instruction. We think the instructions fairly presented the law of the case to the jury, and that the evidence warranted their finding. We perceive no error in this record, and the judgment of the court below must, therefore, be affirmed.

Judgment affirmed.

JABEZ C. PIERSON AND JAMES PIERSON
v.
THOMAS J. FINNEY.

1. VENUE—*Change of, petition unnecessary—ordered by consent.* The venue in all cases can be changed by consent, without a petition to the court.

2. JUDGMENT—*must not exceed ad dammum.* When, in an attachment suit, the affidavit states the sum to be due at fifteen hundred and 35-100 dollars, and the declaration in the conclusion claims damages for one thousand five hundred and fifty dollars, and a judgment is rendered for one thousand eight
[*30] hundred and forty-five 72-100 dollars, and not increased to that sum by running interest, such judgment is erroneous, and will be reversed on appeal or writ of error.

APPEAL from the Livingston County Circuit Court; the Hon. CHARLES R. STARR, Judge presiding.

This was an action of assumpsit brought in the Circuit Court of McDonough county, by attachment. The declaration was filed in that court, and by its order, the venue was changed to Livingston county, on motion of the plaintiff.

The affidavit for the attachment stated the debt to be due from the defendants, at fifteen hundred and forty-six dollars and thirty-five cents. The declaration in the conclusion claimed damages to one thousand five hundred and fifty dollars.

The defendants, in the Livingston Circuit Court, entered their motion to strike the case from the docket, for the reason that the change of venue was not properly taken. This motion was denied and the defendants excepted, and on trial by a jury a verdict was found, and a judgment entered against them for the sum of one thousand eight hundred and forty-five dollars and seventy-two cents, and costs.

From this judgment the defendants took this appeal.

Mr. T. LYLE DICKEY, for the appellant, made the point that it was irregular to change the venue, except in cases provided for by the statute, and the record ought to show affirmatively, that a case under the statute had occurred.

He also insisted it was erroneous to render judgment for more than the amount claimed in the declaration, and that the error could not be cured after error brought or appeal taken.

Mr. JAMES FLETCHER and Mr. CHESTER KINNEY for the appellee, contended that as there was a number of counts in the declaration, claiming in the aggregate more than three thousand [*31] dollars, it was no error to give judgment for more damages than were claimed in the conclusion, citing *Rowley* v. *Berrian*, 12 Ill., 202; *Palmer* v. *Logan*, 3 Scam., 56; *Henry* v. *Loazef*, 5 Blackford, 273.

Upon the question of the jurisdiction of the Livingston Circuit Court, they said the record showed that both parties consented to a change of venue, and that it was authorized by the statute.

Mr. JUSTICE BREESE delivered the opinion of the court:

The first objection taken in the case, that a change of venue was ordered on motion of the plaintiff, without any cause assigned, is not tenable, for the record shows the change of venue was by consent. It is competent for parties, at any and all times, to change the venue of a cause by consent, without any petition to the court or other proceeding than having the consent entered of record.

There is, however, one error in the record which must be fatal. The declaration is in assumpsit, wherein the damages claimed are

laid at one thousand five hundred and fifty dollars, and there is a judgment for the sum of one thousand eight hundred and forty-five 72-100 dollars, and not increased to that sum by accruing interest.

The affidavit for the attachment states the sum now due as fifteen hundred and fifty-six 35-100 dollars, and no more.

The rule is too well settled, that a party cannot recover beyond the damages laid in his declaration, no matter how many counts he may have in it. *Pickering* v. *Pulcifer et al.*, 4 Gilm., 79; *Rives* v. *Kumler*, 27 Ill., 202; *Wolcott, impleaded*, v. *Holcomb*, 24 ib., 331.

The judgment is reversed and the cause remanded.

Judgment reversed.

[*32] CYRUS ALDRICH *et al.*
v.
STEPHEN ALDRICH *et al.*

1. GOVERNMENT LANDS—*entry of.* When a person enters land at a Government Land Office, and pays for it either by a land warrant or in money, he acquires precisely the same equitable rights that he would in a similar transaction with a private individual. The government is selling simply as a land proprietor, and has no right, at its own mere discretion, and without just cause, to cancel its contract. If it does so, and issues the patent to another person having notice of the rights of the first purchaser, a Court of Chancery will direct the conveyance of the legal title to the rightful owner.

2. SAME—*cancellation of entry.* If the government officers cancel an entry *semble*, that the courts will presume, in the absence of proof, that such cancellation was upon valid grounds. But if it affirmatively appear that such cancellation was wrongfully made, the courts will disregard it.

3. SAME—If, after land has been entered under a military land warrant, the Commissioner of Pensions cancels the warrant, and thereupon the Commissioner of the General Land Office cancels the entry, and subsequently the Commissioner of Pensions rescinds the order cancelling the warrant, such rescission is evidence that such order of cancellation and the order cancelling the entry in consequence of the cancellation of the warrant, were both improperly made.

WRIT OF ERROR to the Circuit Court of La Salle county; the Hon. M. C. HOLLISTER, Judge, presiding.

This was a bill in Chancery, filed by the defendant in error at the June term, 1858, against the plaintiff in error to compel a conveyance of the legal title of a tract of land. There was a decree for the complainant, and the defendant sued out a writ of error. The facts appear in the opinion.

Mr. GEORGE CAMPBELL for plaintiff in error.

The only error assigned is, that the decree was erroneously rendered, and in sustaining this position we insist—

1. That the allegations of the bill, if taken as true, are not sufficient in law to sustain the decree.

The gist of the bill is— [*33]

First, That the entry of the land by Joscelyn was cancelled by the Commissioner of the General Land Office, *and was never restored*, so that Cyrus Aldrich, or any other person, had a right to enter the land by paying the purchase money upon a legal application made.

Second, That the land warrant certificate was by the Commissioner of Pensions restored as valid, so that the heirs of Joscelyn were entitled to the same rights under it that they would have if it had never been cancelled or located; and they could have made application under this warrant to locate any quarter section subject to private entry either the one in controversy or any other.

Third, That the heirs of Joscelyn never did make application to re-locate the warrant upon this quarter section, or any other, and therefore have no rights either in law or equity thereto.

Fourth, The bill alleges that upon the cancelled certificate being restored as valid and sent to the Dixon Land Office, it was the duty of the officers of said land office to have restored the location of said warrant upon said land in the name of said Wm. S. Joscelyn.

This is not an allegation of law, and is not the law:

1. Because the entry could not be legally restored in the name of a dead man.

2. Because no one except the Commissioner of the General Land Office had authority to rescind the order cancelling the entry.

3. Because no officer of the Dixon Land Office could legally re-locate the warrant except upon proper application by the owners thereof, including an affidavit that the land was then vacant and unoccupied.

4. The decree was not warranted by the evidence.

The bill called for answer under oath and sworn answer [*34] was filed, and there is no material fact set up by the answer that is contradicted by the evidence of two witnesses or by one witness, and corroborating circumstances equal to another. *Trout* v. *Emmons*, 29 Ill. 433; *Myers* v. *Kenzie*, 26 Ill. 56; *Morrison* v. *Stewart*, 24 Ill. 24.

MESSRS. LELAND & BLANCHARD for defendants in error.

The case is an ordinary one of a prior entry by one, and subsequent patent improperly issued to another, when the one making the prior entry and receiving a contract for a patent, should have obtained the promised patent, and when one who improperly obtained the legal title is to be held as a trustee, who should by conveyance be required to place the legal estate in the holder of

the equity. It is not a case of resulting trust at all, but a question of priority between two, each of whom purchased with his own funds.

It is also alleged that William C. Joscelyn was dead when the cancellation of his entry was rescinded and the entry restored as valid. We do not perceive how the fact of his death could deprive William C. Joscelyn's heirs of their equitable right in the entry made during the life of the ancestor. The old certificate of entry which had been cancelled during the life of Joscelyn was restored as valid, and whether the restoration was during his life or after his death does not matter. No new certificate of entry was necessary. The old one remained as though it had never been cancelled, and if a patent had been issued on it to William C. Joscelyn after his death, it would have passed the title to his heirs. Brightly's Digest of U. S. Statutes, p. 455, Sec. 20.

The duties of Commissioner of Pensions in relation to military bounty lands are such as may be assigned to him by the Secretary of War, and as he has acted in cancelling and restoring the entry of Joscelyn, it is to be presumed he did his duty. If it is his duty to issue the warrant certificate, he ought also to cancel it. Brightly's Digest, p. 738, Sec. 1; Ibid, p. 104, Sec. [*35] 5. The defendant Aldrich or his grantee Morgan is entitled to get back the money paid the Government, and because the purchase was void on account of the prior entry. Brightly's Digest, 484, Sec. 147.

There is no denial in the answer requiring the evidence of two witnesses or one, and circumstances, &c., to overcome it. Morgan merely says to the allegations that he is not advised, and requires proof.

It is said that the entry of the land by Joscelyn was cancelled, but never restored, and therefore Aldrich had a right to purchase. We do not understand that the rescinding an order cancelling a military warrant certificate already located entitles the holder of the warrant to locate on another tract of land at all. It necessarily makes valid the location made under it while it was valid and uncancelled, and the warrant with the location attached as incident to it is restored to the condition in which it was when the cancellation took place. When it was cancelled, and information of the fact was transmitted to the land office at Dixon, an entry was there made of this fact, and when the cancellation was rescinded, information of this fact was transmitted to the land office, and a minute of the rescission of the cancellation should have been entered upon the books at said land office. The location of the warrant and the original entry of the land would then appear at Dixon as well as at Washington. A court of equity will treat that as done which ought to have been done.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

On the 25th of August, 1849, one William S. Joscelyn, as the assignee of Martin Wiggins, located a military bounty land warrant at the Dixon Land Office, on a quarter of land situate in La Salle county. On the 15th of May, 1851, the Commissioner of Pensions cancelled said warrant as fraudulent, and on the 5th of November, 1851, the Commissioner of the General Land Office cancelled the entry, and the certificate was returned to the land office at Dixon. On the 28th of May, 1853, the order cancelling the warrant was itself rescinded by the Com- [*36] missioner of Pensions, and the warrant restored as valid, but the order cancelling the entry was not rescinded. On the 2d of June, 1853, the warrant and the order restoring it were sent to the Land Office at Dixon. On the 23d of January, 1854, Cyrus Aldrich, one of the appellants, entered the land and received a patent for it April 26th, 1856, and on the 9th of April, 1858, conveyed it to Harvey Morgan, his co-appellant. Aldrich was receiver of the Land Office at Dixon from the Spring of 1849 to the Spring of 1853. Joscelyn died in October, 1851, and the appellees, Stephen H. Aldrich and Irwin Palmer, claim land under conveyance from his heirs. The land since 1854 has been occupied under the Joscelyn title, the first improvement having been made at that time. It was in cultivation when Cyrus Aldrich conveyed to Morgan. The appellees, Stephen H. Aldrich and Irwin Palmer, being thus in possession and claiming title under the Joscelyn entry, but the legal title being in Morgan through the patent to Cyrus Aldrich, filed their bill against the latter for a conveyance. The Circuit Court decreed in their favor, and the defendants have brought the record to this court.

When a person enters land at a Government Land Office and pays for it, either by a land warrant or in money, he acquires precisely the same equitable rights that he would in a similar transaction with a private individual. The Government in making the sale is acting as a land proprietor, rather than in a strictly governmental capacity. It has no more right, at its own mere discretion, and without just cause, to cancel its contract than an individual would have to do the same thing. It is true, if the Government chooses to do this, and withholds the patent, the purchaser has no remedy, as the courts have no power to compel the patent to be issued. If, however, the Government issues the patent to another person, who takes it with notice of the rights of the first purchaser, then the matter falls under the jurisdiction of a Court of Chancery, and it will compel a conveyance of the legal title to the rightful owner. There is this differ- [*37] ence, it is true, as a matter of proof, between transactions

of this sort occurring between an individual and the Government, and similar transactions between individuals. If the Government officers cancel the entry, as was done in the case at bar, the courts, in the absence of any other evidence, will presume in favor of the official action of the Government officers, that such cancellation was made upon just and valid grounds. If, however, it affirmatively appears that such cancellation was illegally and wrongfully made, the courts will disregard it. We have been referred to no act of Congress, and we are not aware of any, which gives the Commissioner of Pensions a discretionary power to cancel land warrants, or the Commissioner of the General Land Office any such power to cancel certificates of entry. When the last named officer withholds a patent, and orders an entry to be cancelled, because a fraud has been practiced upon the Government, he does this on the same grounds upon which an individual vendor of land would withhold his deed if purchase had been accomplished by fraud. The Commissioner, in such cases, is not exercising that species of judicial power, under the authority of law, which would make his acts conclusive in all collateral proceedings, as in the case of contests about pre-emption rights. He is simply seeking, as an officer of the Government, to protect it from frauds, when, acting perhaps *ex parte* and without notice, he orders an entry to be cancelled. If his assumption of the existence of fraud is well founded, his action is very proper. It will be sustained, when questioned in the courts, as the action of an individual would be, who has repudiated a contract on the ground of fraud, if fraud can be shown to exist. But it cannot be said that he is exercising judicial power, and we go quite far enough in giving to his official acts of this character the benefit of a *prima facie* presumption. We do even this from the mere necessity of the case, because these questions never come before the court in contests between the Government and an individual, but only in cases where the legal title has passed out of the
[*38] Government, and the person claiming under it would often find great difficulty in showing the ground of the Government action. He is therefore entitled to the benefit of the presumption. In support of these principles we refer to *McDonell* v. *Morgan*, 28 Ills., 529, and *Forbes* v. *Hall*, 34 Ill., 159.

Tried by these principles, this case is of easy determination. The fact that the Commissioner of Pensions rescinded his first order cancelling the warrant is sufficient evidence that that order was illegally made. That cancellation having been illegal, and the cancellation of the entry equally so, being founded upon that of the warrant, it is plain that Joscelyn lost no rights under his entry in consequence of such illegal acts of the Commissioner of Pensions, and the Commissioner of the General Land Office.

Neither did Cyrus Aldrich or Morgan acquire any rights, as against the equitable estate of Joscelyn's heirs and their grantees. Aldrich was Receiver in the Dixon Land Office at the date of Joscelyn's entry, and for years thereafter, when the entry was the subject of correspondence, and must have known that such entry was made. It avails nothing to say that he also knew of its cancellation, and did not know that the cancellation of the warrant had been rescinded, because, being once advised that the entry had been made, if afterwards he thought proper to procure the patent by a new entry, acting in the belief that the cancellation had been properly ordered, he nevertheless acted in this at his peril. He must be taken to have known the law. He knew, then, that if the order of cancellation was illegally made, and Joscelyn could show that fact, the latter would lose no rights in consequence of it. He knew that whatever claim he might acquire by his entry, would depend, as a matter of fact and law, upon whether the cancellation was legal or illegal. He simply speculated upon his faith in the legality of the Commissioner's acts. They prove to have been illegal, and therefore his naked legal title was held by him subject to the superior equity of the Joscelyn [*39] entry. Neither is Morgan in any better position. When he bought of Aldrich there was open and visible possession of the land under the Joscelyn title. He bought, therefore, with notice of that claim. The decree was right and is affirmed.

Decree affirmed.

RYLAND D. SHERMAN
v.
JOHN J. BRUCE.

ACTION OF REPLEVIN—*incompetency of witness.* In an action of replevin, by the agent of the mortgagee of personal property, levied upon under execution, by a creditor of the agent, as his property, the mortgagee is not, as between the agent and the creditor, a competent witness for the former. A recovery by the agent, is, in effect, a recovery by the mortgagee, and he will not be permitted to testify in his own favor.

WRIT OF ERROR to the Circuit Court of Kankakee county; the Hon. CHARLES R. STARR, Judge, presiding.

This was an action of replevin, commenced in the Kankakee Circuit Court, by William M. Bruce against Ryland D. Sherman, to the April term, 1863.

A writ was issued on an affidavit made by *John J. Bruce*, who, being duly sworn, "says he is, as agent of William M. Bruce, now lawfully entitled to the possession of the following described goods and chattels, to wit: one span of grey horses, one double

wagon, and one set of double harness, of the value of two hundred dollars, and that the same are wrongly detained from him, by one R. D. Sherman, and that the same have not been taken for any tax, assessment or fine, levied by virtue of any law of this State; nor seized under any execution or attachment against the goods and chattels of said John J. Bruce, liable to execution or attachment."

[*40] A declaration was filed March 17th, 1863, by *John J. Bruce*, wherein he complains that "the defendant took the following goods and chattels, wares and merchandise, to wit: one span of grey horses, one double wagon, one set of double harness, from the possession of the said plaintiff in possession thereof, as agent of William M. Bruce, and unjustly detained the same against sureties and pledges until, &c., and thereupon, the said plaintiff, by George W. Parks, his attorney, complains for that the said defendant, on the 7th day of March, 1863, in the county of Kankakee, State of Illinois, took the cattle, goods and chattels, wares and merchandise, to wit: one span of grey horses, one double wagon, one set of double harness, from the possession of the said plaintiff; in possession thereof as agent of the said William M. Bruce, of great value, to wit: of the value of two hundred dollars, and unjustly detains the same against sureties and pledges, &c."

The name of the plaintiff was changed to John J. Bruce, and leave given the sheriff to file his return.

The defendant filed six pleas:

1. The general issue.
2. Property in defendant.
4. Possession and right of possession in the defendant.
5. Possession in defendant as a constable.
6. Justification by defendant, by a levy upon the property replevied, by virtue of an execution issued by R. Ashley, a Justice of the Peace, against the goods and chattels of William C. Mack, John J. Bruce and Warren C. Mack; $64.80 debt; costs $3.15, in favor of Barber, Hadley & Co.; and that defendant was at the time, &c., a constable of said county and State, and avers that the property was John J. Bruce's.

Plaintiff filed replications to each of said pleas.

At the December term, 1863, a trial was had, before the court and a jury; and on the trial, plaintiff introduced William M. Bruce, the mortgagee of the property in dispute, as a

[*41] witness; and to recover which, plaintiff, as his agent, had brought the suit; defendant objected, but his objection was overruled, and the witness was admitted; and defendant excepted. The jury returned a verdict in favor of plaintiff; and defendant entered a motion for a new trial, which was over-

ruled; and the court rendered a judgment on the verdict, in favor of plaintiff, for "one cent damages and costs." Defendant below brings the case to this court, by writ of error, and insists that the court, among other things, erred in admitting William M. Bruce to testify in the case.

Mr. STEPHEN R. MOORE for plaintiff in error:

William M. Bruce is not a competent witness for the plaintiff. His interest is a direct, immediate interest; if the theory of the prosecution is correct, the property is witness' property; he might have maintained replevin himself, as, indeed, was undertaken to be done in this case. If plaintiff holds the property, then witness holds it; as well might he have been sworn, if the suit was in his own name. 1 Greenleaf, 440 Et Seq.

He is directly interested in having a particular verdict and clearly incompetent. *Favor et al* v. *Marlett*, 1 Gilm., 388; *Marks et al* v. *Butler et al.*, 24 Ill., 568.

"A witness, where title is set up by his agent, a defendant in replevin, is incompetent for the defendant." *Russel* v. *McKenzie*, 13 Maryland, 560.

This is the case at bar. If he could not be a witness to sustain the title in the agent as defendant, he could not be a witness to sustain his title as plaintiff.

Mr. M. B. LOOMIS for the defendant in error:

This action was not brought to determine the general ownership of the property replevied, but the plaintiff having a special property in the chattels, as agent, brought this action to recover his own special interest therein, as he legally might do, in his own name, and independent of his principal, and the only object in showing, by the testimony of William M. Bruce, that [*42] the said property was taken possession of by said William M. Bruce, under and by virtue of the chattel mortgage, and by him placed in the hands of the plaintiff, as his agent, to be kept, according to the terms of the agreement, between them, was, to establish the special interest of the plaintiff, and not to show the title or interest of the witness in and to the property. The general ownership was not, therefore, determined, nor brought in question, and only the right of possession was passed upon, nor was it necessary to be determined. *Warner* v. *Mathews*, 18 Ill., 83; *King* v. *Ramsey*, 13 Ill., 519: 1 Greenlf. Ev., sec. 408; *Illinois Mutual Fire Ins. Co.* v. *Marseelles Manufacturing Co.*, 1 Gil., 236; 1 Greenlf. Ev., sec. 289; *Bailey* v. *Burton*, 8 Wend., 347; *Duel* v. *Fisher*, 4 Denio, 515; *Curtenius* v. *Wheeler*, 5 Gilm., 462.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

The only question which we propose to consider, is, whether William M. Bruce was a competent witness. It appears from his testimony, that defendant in error, being indebted to the witness, had executed to him a mortgage on the property in controversy, to secure its payment. Defendant in error was at the time residing on the farm of witness. Afterwards, in the following year, William and defendant entered into an agreement, by which the latter, for the sum of two hundred and fifty dollars per annum, agreed to labor upon, and conduct the farm, and attend to the stock thereon, and which might afterwards be placed upon the farm, by his brother William. At the time this arrangement was entered into, William took possession of the mortgaged property and delivered it to defendant in error, to be kept as the agent of William. Afterwards, in March, 1863, the property in dispute was levied upon, and taken by plaintiff in error, by virtue of an execution against defendant in error, and other persons.

And on the day of the levy, it was replevied by defendant [*43] in error. On the trial below, William M. Bruce, the mortgagee of the property in dispute, was admitted as a witness against the objections of plaintiff in error. The trial resulted in a verdict and judgment in favor of defendant in error.

The record shows, that the suit was instituted by defendant in error, as the agent of William M. Bruce, the mortgagee. The latter was, therefore, the real party in interest. A recovery by his agent, would be a recovery in effect by him. A recovery by defendant in error, would restore the possession to him, as his agent could not deny his title; and the possession of this agent would be his. It then follows, that he was as fully interested in the event of the suit as if he had been the plaintiff on the record. He was called to testify in favor of his own interest, and was therefore incompetent, and should have been excluded. In admitting him to testify, the court below erred. There being no other evidence for plaintiff below, when this is excluded, there is nothing left to support the judgment; and it must be reversed, and the cause remanded.

Judgment reversed.

CHARLES BALLANCE
v.
GEORGE LEONARD.

1. BILL OF EXCEPTIONS—*must contain the evidence referred to.* Where the bill of exceptions does not purport to contain all the evidence, the verdict of the jury will not be questioned. The court must, in such case, presume it is supported by the evidence.

2. DOCUMENTARY EVIDENCE—*admission of.* So in admitting documentary evidence, such as a deed, the court cannot say, without the evidence is on record, whether it was or not properly admitted.

3. INSTRUCTIONS—*must be in bill of exceptions.* This court cannot pass upon instructions, if they are not brought into the record.

ERROR to the Circuit Court of Peoria county; the Hon. [*44] M. WILLIAMSON, Judge, presiding.

This was an action of forcible entry, brought by Charles Ballance against George Leonard, before a Justice of the Peace of Peoria county, where a trial was had and a verdict and judgment for the plaintiff.

On appeal to the Circuit Court of that county, there was a verdict and judgment for the defendant.

The plaintiff brings the case to this court by writ of error, and several errors are assigned, among which are that of admitting a deed from one Marshall to Barton as evidence on the part of the defendant.

In refusing to give proper instructions asked for by the plaintiff.

In giving improper instructions on behalf of the defendant.

Mr. CHARLES BALLANCE in proper person.

Messrs. MCCULLOCH and TAGGART for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the court:

It has been again and again ruled by this court, that when a bill of exceptions does not purport to contain all the evidence, the verdict of the jury will not be questioned. We cannot enquire in such case, if the verdict is supported by the evidence, but must presume that it is. *Warner* v. *Carlton*, 22 Ill., 422; *Stickney et al.* v. *Cassell* 1 Gilman, 420; *Harris et al.* v. *Winer*, 28 Ill., 138.

So with respect to Marshall's deed, we cannot say, all the evidence not being before us, whether it was properly admitted or not.

Nor can we pass upon the instructions, as they are not incorporated into the record. The judgment must be affirmed.

Judgment affirmed.

[*45] JAMES L. ADAMS *et al.*
v.
JAMES M. ROBERTSON *et al.*

1. CONFLICT OF LAWS. The laws of every country allow parties to enter into obligations with reference to the laws of the country where such obligations are to be performed; and although such obligations may not be in accordance with the laws of the country where they are made, as regards obligations to be performed in that country, they may be strictly in accordance with such laws as to obligations to be performed in other countries.

2. SAME. But a limitation in the laws of all nations of the right to enter into contracts to be performed in other countries, requires that they shall be in accordance with the laws of the country where they are made, or else in accordance with the laws of the country where they are to be performed.

3. SAME. The rights enforced by courts where contracts are made in one country to be performed in another are those given by the law of the country where the contract was made, and such rights are enforced in the country where the contract is to be performed, not as a matter of right, but as a matter of comity extended toward the country where the contract was made.

4. SAME. Where a contract is made in one State for the payment of interest in another, at a higher rate than is allowed by the laws of either State, the fate of the contract depends upon the laws of the State where it was made. It is the laws of that State that have been violated.

5. USURY. In a contest between two creditors as to the proceeds of a security held for the benefit of both, one creditor cannot raise against the other the question of usury in behalf of the debtor. The debtor must assert his own rights.

6. CREDITORS. Where an absolute deed was made to the President of a bank who thereupon gave back a defeasance undertaking to reconvey upon the payment of what the debtor owed the bank and another creditor, the presumption is that the bank and the other creditor were to share *pro rata* in the proceeds of the security.

7. WRITTEN INSTRUMENTS—*parol evidence*. Written instruments are made to express the agreements of parties, and safety of the community requires allegations of mistakes in them should be regarded only where the evidence is clear, free from suspicion, and entirely satisfactory.

APPEAL from the Circuit Court of Douglas county; the Hon. O. L. DAVIS, Judge, presiding.

[*46] This was a proceeding in chancery commenced in 1849 for the purpose of settling the rights of different creditors in the proceeds of a mortgage which had been given for their common benefit. The facts are substantially as follows:

In February and March, 1856, James M. Robertson, then a resident of Indiana, was indebted to the Prairie City Bank as *acceptor* of three bills of exchange, to wit: One drawn by John Vestal, dated August 7, 1855, due December, 1855, for $2,100; one drawn by Barney Allen, dated August 29, 1855, due January 1, 1856, for $3,600; one drawn by himself at thirty days, dated November 10, 1855, for $2,000, and as *drawer* of another bill dated August 20, 1865, due January 24, 1856, for $4,550. In the aggregate $11,650.

These bills were all purchased by the bank from Robertson, at about the time of their several dates, and were drawn in Indiana, payable in the city of New York, and were based upon actual transactions, to-wit: The shipment of hogs and cattle. The rate upon which the bills were taken was as follows: Upon the 30 day bill, interest in advance; upon the other bills interest and one-eighth of one per cent. per month, which was the customary bank rate in Terre Haute for time bills on New York.

The Prairie City Bank was a banking corporation of the State of Indiana, at Terre Haute, having authority "to carry on the business of banking by discounting bills, notes, &c.;" "by *buying* bullion, coin, and *bills of exchange;*" entitled "to charge and receive for moneys loaned, interest at a rate not exceeding 6 per cent. per annum" and having power to hold real estate for security, &c., in the name of the President.

Complainants were at the time stockholders of the bank, owning a majority of the stock, and Graham, a member of the firm, was one of the Board of Directors, C. W. Barbour was President, and John S. Beach, Cashier.

The first three bills were not paid at maturity, and Robertson asked for renewal, which the bank refused without further security. So soon as Robertson made default, Barbour wrote to Graham, then at New Orleans. Graham came up in February, and he and Barbour sent for Robertson, who came [*47] at once to the bank, and a negotiation was made by which Robertson agreed to give to the bank a deed for his land in Illinois, as security for the bank debt, the debt then to be renewed, and also to secure anything that he might owe to the complainants.

Complainants had made advances to Robertson upon hogs, which were then at a packing house in Terre Haute. At the then prices there would have been no liability, but by the subsequent decline in prices the debt became $2,300.

Robertson says it was the distinct understanding that the bank debt was to have priority in the security. Barbour does not remember that anything was said about it.

At a meeting of the Board of Directors in February, Graham being present, Barbour presented to the board the proposition of Robertson, that he would give to the bank a deed of his land as security for the bank debt, and that the bills should be renewed. The board accepted the proposition, and instructed Barbour to obtain the deed. Graham advocated and voted for it. Nothing was said about the debt to complainants. In March, 1856, Robertson executed to Barbour, *as President*, the deed, and on same day Barbour gave to Robertson a defeasance, stipulating that upon the payment of the bank debt, setting out the time, and also "what may be due to Graham & Buckingham," the

land should be reconveyed. On the 28th of March Barbour presented the deed to the board, representing that it was taken as security for the bank debt—nothing being said about the debt to complainants. The deed was accepted, the renewals made, and the old bills surrendered to Robertson. In June, the first payment of $4,500, mentioned in the defeasance, was made to the bank. That afterwards, in February, 1858, the deed to Barbour being incorrect in its description of the land, a reformed deed was made to S. S. Early, *as President*, he being the successor of Barbour in that office.

Graham & Buckingham, the complainants, filed the bill to foreclose the mortgage, making Robertson, the bank, Barbour,
[*48] Early and Bryan defendants. At the August term, 1860, the bank filed its cross bill; and, upon the written stipulation of parties, the cause was heard upon the right of the bank and complainants to a decree against Robertson and Bryan, agreeing that their own right and equities should be afterwards determined "without regard to the form and substance of the pleadings." A degree was therefore made for the sale of the land, and the property bid in by agreement in the name of S. S. Early, for the benefit of the parties, according as their respective rights and equities should be settled by the court.

Messrs. GOOKINS, THOMAS & ROBERTS for appellants, submitted the following points and authorities:

Bill of foreclosure, by Adams *et al. v.* Robertson, the mortgagor, Barbour, a trustee of both parties, and Early, trustee and President of the Prairie City Bank, a mortgagee in the same mortgage. There was a decree, sale, the property bought in, in trust for both mortgagees, and is held subject to the disposition of the court. The only question in this court is as to the relative rights of the mortgagees in the property. The mortgage consisted of a deed, absolute on its face, and a separate defeasance. Both parties claim priority in the security.

1. The deed, and a written defeasance of the same date, were, as appellants insist, made at the same time, and constitute the mortgage. This the appellees deny, and seek to prove by parol that the defeasance was made subsequently. They bear the same date, refer to the same subject matter, appear to be one, and their legal effect cannot be changed by parol. *Austin* v. *Sawyer*, 9 Cow., 39.

2. The bank is not entitled to priority in the security, for—

First, Supposing the parol evidence competent, the whole evidence shows to be parts of one transaction.

[*49] *Second*, The deed and defeasance constituting the mort-

gage, the appellees could have a priority only by reforming it. *Davis* v. *Cox*, 6 Ind., 481.

Third, It could not be reformed, nor were the appellees entitled to any affirmative relief on the pleadings. *Ballance* v. *Underhill*, 3 Scam., 453; *Tarleton* v. *Vietes*, 1 Gilm., 470, 472; *Broadwell* v. *Broadwell*, Id., 603.

Fourth, If the instrument could be reformed, in the present state of the pleadings, it could be done only on proof of fraud, or mistake. The proof must be clear and not conflicting, and the diligent only are entitled to relief against frauds and mistakes. Story's Eq. Jur., 152, 146, 149; *Broadwell* v. *Broadwell*, 1 Gilm., 599.

The bank was in possession of evidence bearing on this question, which it withheld. Every intendment will be indulged against one who withholds evidence, in his possession, which would explain controverted questions. 2 Cow. & Hill's Phillips, 293; 3 Cow. & Hill's Phillips, 1193; 9 Ind., 323, 332; 7 Wend., 31.

3. The bank is not entitled to participate in the security until the complainants are paid in full.

First, It took more than six per cent. interest on its loans to Robertson. The appellees claim there was no loan to Robertson, but a purchase of bills from him. The bills were all accommodation bills, and had no obligation as contracts, until discounted by the bank. It was, therefore, a loan of money. *Bank of Indiana* v. *Ross*, 1 Blackf., 315; 8 Cow., 669, 686, 697; 2 Denio, 621; 15 Johns., 57; 6 Ind., 233, 234–5.

Second, The bank, under its charter, could take no more than 6 per cent. interest. 1. R. S. Ind., 1852, p. 157, sec. 20.

Third, More than 6 per cent. interest having been taken, the contract is *ultra vires* and void. *U. S. Bank* v. *Owens*, 2 Pet., 527; *Bank of Chilicothe* v. *Swayne*, 8 Ohio, 286; *Orr* v. *Lacy*, 2 Doug., (Mich.) 353; *Metropolitan Bank* v. *Godfrey*, 23 Ill., 579, 602; 1 Wend., 56; 7 Id., 31.

The appellees cite *Billingsley* v. *The State Bank*, 3 [*50] Ind., 375. That cannot aid *in giving effect to the contract*, for a foreign law is not noticed, unless alleged and proved. *McAllister* v. *Smith*, 17 Ill., 328.

As an *authority* it is a mere *dictum*, and is overborne by the numerous authorities opposed to it.

Fourth, The complainants can take advantage of this defect in the security of the bank. It could only have affirmative relief by filing a cross bill, to which the complainants would have been defendants. It is not, therefore, like a bill to redeem a usurious mortgage. Our position is strictly that of a defendant. Conceding (which we do not admit) that a contract *ultra vires* stands on

the same footing as one void for usury, still, one in privity of contract, or estate, may insist that the security is void. *Jackson* v. *Dominick*, 14 Johns., 435; *Cole* v. *Savage*, 10 Paige, 583; *Dix* v. *Van Wyck*, 2 Hill, 522; *Scott* v. *Lloyd*, 4 Pet., 205; *Stafford* v. *Vail*, 22 Ill., 327; *Morse* v. *Hovey*, 9 Paige, 197; *Jackson* v. *Tuttle*, 9 Cow., 233; *Post* v. *Dart*, 8 Paige, 639.

Fifth, The contract is void by the law of New York, where the bills were payable. 2 R. S., N. Y., 181-2, p. sec. 1, 2, 5.

Sixth, If the contract was usurious, and it is governed by the law of Indiana, the bank can only recover the principal without interest. 1 R. S. Ind., 1852, p. 344, sec. 4.

4. On the face of the security, the complainants are entitled to priority. The debt of the complainants was due when the mortgage was given, for if a party has broken his contract, an action lies at once. *Fox* v. *Kitton*, 19 Ill., 519.

5. On promise to pay, no time being limited, an action may be brought as soon as it is made. Story on Pro. Notes, sec. 30.

This, then, was a mortgage to secure a debt then due to complainants, and those due to the bank, (as it claims,) in
[*51] installments, due in the future. In such case they are regarded as successive mortgages. *Vansant* v. *Allman*, 23 Ill., 30.

6. The decree should not have been based upon the amount of the commissioner's sale.

Mr. BALLARD SMITH, for appellees, submitted the following points and authorities:

1. *First*, Complainants cannot plead usury, Robertson having in his answer expressly denied it, and having expressly refused to recognize such a defense.

The rule is, that "a usurious contract can only be avoided by the party who made it, or by some one standing in *legal privity* with him, and not by a mere stranger to the transaction." 22 Ill., 329; 8 Paige, 641; 11 Ind., 402; 4 Dana, 177. "No person can set up the defense of usury, but *a party* to the usurious contract, or one who represents him as a *privy in blood or estate*." 4 Barb., 341; 1 Barb., 278; 7 Hill, 391; 8 Paige, 641.

Thus, as to the contract, a surety can plead usury. 9 Paige, 198; 7 Hill, 405. As to the property, one who is privy in representation, as the executor; or in blood, as the heir; or in estate, as the grantee. 14 John, 435. A creditor who has obtained execution, may seize and sell the property of the debtor, and set up the defense of usury against the prior incumbrancer, 2 Hill, 525; 9 Cowen, 233; for the reason that "a purchaser under an execution is an assignee by operation of law, and he stands in *legal privity* with him." 2 Hill, 525.

But the creditor acquires the privity by the sale and purchase. 8 Paige, 641. To constitute the *legal privity*, there should be title to the land. 2 Hill, 526; 13 Mass., 515.

Hence a mere mortgagee has no *legal privity* with the debtor in the land. A mortgage is a mere chose in action—a security only. 2 Barb. Chy. Rep., 135; 4 Kent Com., 160.

The Supreme Court of the United States say that "it is [*52] *perfectly established*, that the plea of usury is *personal* and peculiar, and however a third person, having an interest in the land, may be affected incidentally by a usurious contract, *he cannot take advantage of the usury*," 10 Wheat., 393; which ruling is expressly affirmed by the Court of Appeals of New York. 2 Selden, 352-3. I can find no case where it has ever been held that a mere mortgagee can plead usury; but, on the contrary, in 1 Barbour, 271, where "it was a contest between two creditors in respect to the surplus produced by a sale on a mortgage," "it was decided that as between two incumbrancers, the subsequent incumbrancers were strangers to the first contract, and could not avoid it for usury;" and this ruling is referred to approvingly by the Court of Appeals. 2 Seld., 354.

Second, It is well settled in New York, that persons who accept a lien upon, or interest in, the equity of redemption of mortgaged premises, *as mortgagees*, or purchasers, expressly subject to the lien of the prior mortgagee, *cannot avail* themselves of usury in such mortgage." 2 Selden, 347; 8 Paige, 642; 9 Paige, 145; 10 Paige, 591; 2 Denio, 598; 2 Com., 131.

For the reason, that if they take, with the understanding that the other shall also be paid, they cannot be heard to the contrary.

The evidence is clear in this case, that the mortgage in question is taken to the bank to secure the bank debt, with the knowledge, and at the especial instance of the complainants, through their partner and agent, Graham, and that the private negotiation by him with Robertson, as to the debt of complainants, was made with the express understanding that the bank debt should be secured by the deed, "with interest *at the customary bank rates.*" 4 Barbour, 495. *They* cannot now be permitted to avoid that agreement.

Third, It is a settled maxim, that "a usurer cannot plead usury." When these bills were bought by the bank, complainants owned more than one-half of the stock of the bank, and, of course, were the owners of more than one-half of [*53] the bills, which stock they have since assigned, and their assignees, of course, became entitled to complainant's interest in the bills. In New York, it is held that "where a transaction is usurious, no one *who has been connected with the transaction*, or

who stands chargeable with notice, can set up the defense. Barb., 5, 660-1.

So the Court of Appeals held that "the borrower may set up usury for the purpose of avoiding a contract tainted with it, but the lender cannot. 5 Selden, 243; 4 Barb., 346.

It would be against equity to permit complainants, who were directly connected with the purchase of the bills, to set up this defense against their own assignees, 1 Story, Eq. Juris., sec. 301, particularly as Graham was one of the directors, and is presumed to have had notice.

Fourth, Where a party comes into a Court of Equity seeking relief against a usurious contract, the only terms upon which the court will interfere, are, that he will pay what is really and *bona fide* due, deducting usurious interest. 1 Story Eq. Juris., sec. 301; 3 Barb., Chy., 641; 8 Paige, 548.

The statute of New York changed this law so far as to permit *borrowers* to rely upon this defense in chancery, without the tender of the amount borrowed, and legal interest, 11 Wendell, 331; but the rule applies to all other persons. 3 Barb., Chy., 641. The term *borrower*, applies only to the party borrowing, his sureties, heirs, devisees and personal representatives, 7 Hill, 391; and not to grantees. Id.; nor to mortgagees, 3 Barb., Chy., 641.

Complainants file their supplemental bill, alleging usury, asking a discovery, and praying that the bills may be avoided on the ground of usury; but they are neither the borrowers, sureties, heirs, devisees, nor personal representatives, and, therefore, such prayer cannot be entertained, without their first paying, or offering to pay, the sum actually borrowed, and interest, 7 Hill, 391, which they have not done.

[*54] 2. There was no usury in the transaction.

The mortgage was taken to secure the first four bills, and the question of usury is confined to these bills; the renewals being subsequent to the security, cannot affect it. 5 Wend., 597.

The bill for $4,500 was paid at its maturity, and of course that is not questioned.

The bill for $2,000, at thirty days, was bought at the rate of six per cent. per annum in advance, one per cent. less than the New York rate, and cannot be questioned. 3 Wendell, 408; 4 Wendell, 652.

So that the question of usury is confined to the other two bills—one for $2,000, and one for $3,000—which were taken at interest, and one-eighth of one per cent. per month, equivalent to seven and one-half per cent. per annum, which was the customary bank rate at Terre Haute for time bills on New York, at the time of purchase.

It is clear that there was no *actual* corrupt or usurious interest; that the question of usury is merely technical; and that the whole burden of the proof rests upon the complainant.

The ground upon which complainants rely is, that the bills having been bought of the acceptor, he appearing as their owner, they had no existence before the discount, and, therefore, the transaction was but a loan of money, and the bank could not recover more than at the rate of seven per cent. per annum.

The rule in New York is, that where "a note or bill is *accommodation paper*"—that is—"where it is made for the purpose of raising money upon it," "having no existence until discounted, and depending upon a valid discount for its life," and is discounted at a higher premium than the legal rate of interest, such discounting would be usurious. 15 Johns., 55, 535; 17 Johns., 181; 8 Cowen, 678, 686.

But where the note or bill is *business paper*—that is, "where it was originally given for a legal consideration, it cannot afterwards become usurious, at whatever rate it may be [*55] purchased or discounted." 8 Cowen, 696; 7 Wend., 597; 9 Paige, 481.

"It is well settled that discounting a *business note* at more than seven per cent. interest, is not usury; a note valid in its inception may be bought and sold as a chattel, at its value, real or supposed." 7 Wend., 257.

The averment of the defendant, Early, in his answer, upon oath, is: "That at the various times the said bills were taken, they were represented and understood by the said bank, to be based upon actual transactions, to wit: the shipment of hogs to the Eastern market."

And the evidence is, "that at the time these bills were taken, Robertson's business was that of dealing in cattle and hogs, and shipping to the New York market, and that *these bills were* based upon shipments of cattle and hogs.

This is the only evidence in reference to the consideration of the bills; and establishes the fact that they were *business paper*—a legal commodity—and had a valid inception.

The rule of evidence is, that to make out the defense of usury, it is necessary for the party alleging usury "to show that the paper was *not valid* when discounted;" "the presumption is in favor of the validity" of the paper; "it implies a sufficient consideration." 7 Wendell, 257.

It is not proven that it was accommodation paper, nor that it was made for the purpose of raising money, nor that it had no validity until discounted. The only proof is, that Robertson sold the bills to the bank, and got the proceeds; that so far as the bank

knew, he was the owner of the bills, and that the bank regarded the other parties as sureties.

So far as the other parties were concerned, Robertson being the acceptor of the bills, they were his sureties to the bank, and were properly so regarded.

[*56] The question is, the bills being based upon actual transactions, does the fact that they were sold by the acceptor, he holding himself out as the owner, and receiving the proceeds, make them void, if a greater rate than legal interest was reserved?

It would be difficult to find an authority in favor of such a proposition. Certainly there is none in any of the New York reports. On the contrary, it is well settled law, that, "when a bill has been created, according to the custom of merchants, as a real commercial transaction, it is part of the general circulating medium of the currency, and the acceptor, after its issue, stands with regard to a retransfer of it to himself in the same position as any other person." "He may discount it, and if he discounts it, he may re-issue it." 36 Eng. Law. and Eq., 563; 7 Mess. & Wels., 174; 11 Ind., 533. That is, that the acceptor of a bill, may, at any time before its maturity, purchase it and re-issue it, and such purchase and re-issue will not affect its validity, it being a marketable commodity. How Robertson acquired these bills is not shown, the complainants, having the opportunity, did not inquire, and they make no proof. But to rebut any presumption, arising from the purchase from the acceptor, that the bills were accommodation paper, the defendant alleged and proved that they were real commercial transactions, based on actual shipments of cattle and hogs—business paper. So that the necessary presumption is that Robertson acquired them by purchase, and was a holder for value; particularly upon a question of usury, where every presumption is in favor of the validity of the bills. 3 Cowen, 284; 22 New York, 472.

It is clear then, from the evidence, that these bills were genuine, having a valid inception, and actual existence, before the sale to the bank; and as such, the bank might, under its charter, and under the laws of New York, buy them at any rate of discount. 3 Edwards' Chy., 146.

[*57] *Ultra Vires.*—It was urged by complainants, upon the hypothesis of usury in the original transaction, that the bills were void under the doctrine of *ultra vires*. But it will be conceded that the question whether the bank exceeded its powers in the purchase of the bills, and if so, whether the excess avoids the entire bills, must be determined by the charter of the bank; and it is clear that the decisions of the Supreme Court of the

State, which created the bank, must be authoritative in construing the provisions of such charter. 13 Conn., 257.

The question was presented to the Supreme Court of Indiana, upon a similar clause in the charter of the State bank, in the case of *Billingsley* v. *State Bank*, 3 Ind., 376, where the decision of the court below was reversed, and it was held that the taking of usury by the bank was not such excess of power as avoided a contract.

The language of the charter of this bank is: "Such association shall be entitled to charge and receive, for moneys loaned, interest at a rate not exceeding six per centum per annum," 1 Rev. Stat., 157, sec. 22, and of the charter of the State bank is, "Said bank shall be entitled to charge and receive, for money loaned, six per cent. per annum, and not higher." Sec. 13; Abs. 15, 154; 2 Doug., 2.

The true rule undoubtedly is, "there being no declaration of invalidity in the charter the in-part usurious does not avoid." 40 Maine, 113; 9 Man., 49, 13 C.

So in a recent case in the New York Court of Appeals, it is intimated by one of the judges (COMSTOCK, Ch. Justice) that under the doctrine of *ultra vires*, an excess of power does not avoid the entire contract, 22 N. Y., 269, and the question was left undecided.

The summing up of the question of usury results in this, That

1st. If there be any usury in the transaction, which is clearly not shown, it does not void the charter, because there is no declaration of invalidity therein. 3 Ind., 376.

2d. It does not void either the bills or the legal interest [*58] under the statutes of Indiana. 20 Ind., 263; 19 Ind., 68, 121.

3d. The complainants are in no condition to avail themselves of such a plea, either under the decisions of Indiana, or Illinois, or New York.

The opinion in this case was originally prepared by Mr. JUSTICE BECKWITH, and, after a re-hearing at the April term, 1865, adopted, with slight modifications, as the opinion of the court.

OPINION OF THE COURT:

This is a suit in equity, brought to foreclose a mortgage and divide the proceeds arising from the sale between the appellants and the Prairie City Bank, one of the appellees. It appears that Robertson was indebted to the bank in the sum of $11,500, specified in four bills of exchange drawn and accepted in the State of Indiana, and payable in the State of New York. The bank in discounting two of the bills reserved interest at the rate of seven

and one-half per cent. The laws of Indiana allow interest to be reserved at the rate of six per cent., and the laws of New York prohibit the taking of a greater rate of interest than seven per cent., under the penalty of the forfeiture of the debt. Robertson was also indebted to the appellants, who were transacting business under the name and firm of Graham & Buckingham, in the sum of about $2,000. On the 20th day of March, 1856, Robertson executed an absolute deed of several tracts of land to Barbour, as president of the bank, and Barbour, on the same day, executed a defeasance undertaking to reconvey the lands to Robertson, upon payment of what he owed the bank, and what he might owe Graham & Buckingham.

The appellants insist that the bank has, under the laws of New York, forfeited so much of the debt due to it as was specified in the two bills of exchange upon which seven and one-half per cent. interest was reserved; and that they were void for the rea-
[*59] son that the bank had no power to reserve a higher rate than six per cent. interest. The appellants also insist that they are entitled to share equally in the benefits of the security taken from Robertson. The bank insists that it has a priority. The bank filed a cross bill against Robertson for a foreclosure of his equity of redemption, and obtained a decree under which the premises were sold and purchased by the appellee, Early, for the benefit of the bank and of the appellants, according to their respective interests, as they might be determined by the court.

Great conflict of opinion has prevailed in respect to the laws affecting the validity of contracts made in one country, but to be performed in another. The laws of the country where a contract is made are obligatory upon the parties; and upon principle no contract declared void by those laws ought to be enforced in any other country. As an exception to the rule, it has been held that no nation is bound to take notice of or protect the revenue laws of another country; but this exception has no foundation in principle, although it is perhaps so firmly established that courts cannot now overturn it. No man ought to be heard in a court of justice to enforce a contract founded in or arising out of moral or political turpitude, or in fraud of the just rights of the country in which the contract was made. Story's Conf. Laws, p. 345. The laws of every country allow parties to enter into obligations with reference to the laws of the country where such obligations are to be performed; and although such obligations may not be in accordance with the laws of the country where they are made as regards obligations to be performed in that country, they may be strictly in accordance with such laws as to obligations to be performed in other countries. The right to enter into contracts with reference to the laws of another country is one allowed by nations

for the convenience of those transacting business within their respective territorial limits, to enable them to obtain such rights as they could have secured in the country where the contract is to be performed, by a just observance of its laws. No nation can be justly required to allow persons subject to its laws to [*60] enter into contracts without reference to and not in accordance either with its own laws or with the laws of the country where the contract is to be performed. A limitation in the laws of all nations of the right to enter into contracts to be performed in other countries, requires that they shall be in accordance with the laws of the country where they are made, or else in accordance with the laws of the country where they are to be performed. The laws of a country have no extra-territorial force, and do not prohibit persons from doing any act or making any contract in another country. The courts of one country may refuse to enforce contracts made in another country where they are immoral or unjust, or where the enforcing of them would injure the rights, interest or convenience of that country or its citizens; but the laws of a country, as such, have no operation or effect upon acts done or contracts made beyond its territorial limits. The rights enforced by courts where contracts are made in one country to be performed in another, are those given by the law of the country where the contract was made, and such rights are enforced in the country where the contract is to be performed, not as a matter of right, but as a matter of comity extended towards the country where the contract was made. Persons making contracts with reference to the laws of the country where such contracts are to be performed, may expressly or impliedly stipulate for the rights and benefits given by the laws of that country, as a part of the contract, and the laws of the country where the contract is made secures to the parties the rights and benefits thus agreed upon in the same manner as if the laws in reference to which they contracted were incorporated into the contract.

In determining the consequences attendant upon making a contract in one country to be performed in another, which is not in accordance with the laws of either country, we should ascertain which country's laws have been violated. As, for example, the laws of Illinois allow parties to contract for interest at the rate of ten per cent., while the laws of New York [*61] allow only seven per cent. Persons who make contracts in Illinois for interest at the rate allowed by its laws, violate no law of the State of New York, and are not subject to the penalties imposed by the laws of that State upon persons who enter into contracts within its territorial limits in violation of such laws. A creditor who has made no contract in New York does not violate its laws by receiving money from his debtor in that State,

or undertaking in another State to receive it there. The laws of Indiana allow persons to contract for interest at the rate of six per cent., in case the contract is to be performed in that State, and at the rate of seven per cent. if the contract is to be performed in New York, but prohibit contracting for a greater rate of interest in either case. Persons entering into contracts in Indiana reserving a greater rate of interest than is allowed by its laws in such cases, thereby violate laws of the State, and incur the penalties imposed for such violation. The courts of neither State will enforce the contract, because the rights asserted under it are in violation of the laws of the State where it was made. The fate of such a contract depends upon the laws of the place where it was made, being subject to the legal consequences attendant upon the violation of those laws. *Andrews* v. *Pond*, 13 Pet., 65. In *Smith* v. *McAllister* (17 Ill. Rep., 328,) this court held that pleas setting forth that the bills of exchange upon which suit was brought were made in Illinois and payable in the State of New York, under a contract not in accordance with the laws of either State, ought not to have been stricken from the files for immateriality. While the reversal of the judgment in the court below upon that ground was undoubtedly correct, upon a careful review of the subject, we are not satisfied with all the reasons given on that occasion. We are of the opinion that the consequences of entering into the contract in that case should have been determined by the law of the place where the contract was made.

The appellants cannot object to the bank's taking the bills of exchange in question and security for their payment, nor [62*] question its authority so to do. No illegal interest was taken from them, and none is sought to be taken from them. They are not at liberty to assert Robertson's rights.

The presumption arising from the defeasance executed by Barbour is that the bank and the appellants were to share equally in the benefits of the mortgage security. 1 Story's Eq., 64; 9 Paige, 360. It is unnecessary for us to consider whether parol evidence is admissible to rebut such presumption and establish an agreement giving the bank a priority without a reformation of the defeasance, as the bank may in its defense to the appellants' bill show that the instrument does not truly express the agreement of the parties owing to fraud, accident or mistake. The counsel of the bank urged in argument that it was not known to its board of directors that the conveyance was taken as security for the debt due to the appellants; that Graham, who was one of the directors, was present at a meeting of the board when it was determined to take the security, and did not disclose that it was to be taken for the benefit of his firm; that

Barbour, without its knowledge, executed the defeasance in its present form; and that, supposing the security was taken for its own benefit, the bank surrendered to Robertson the bills of exchange which it then held, and thereby discharged the liability of the endorsers thereof. There is no doubt of the fact that the appellants were in some manner to participate in the benefits of the security. Robertson, Barbour, the written memorandum made at the time, and the defeasance drawn from it, all agree that the appellants were in some manner to be interested in the security. The board of directors consisted of nine persons, five of whom it is presumed were a quorum. The arrangement to take the security was made between Robertson and the directors before they convened in the bank to act upon it formally. It is evident that Barbour, Graham and Farrington, three of the directors, knew the precise nature of the arrangement, and it is highly probable that Turner, another director, was also aware of it. Before any fraud should be presumed, we ought to be informed [*63] who were present at the meeting of the board of directors, and there should be some inquiry whether those present did not understand that the appellants were to share in the benefits of the security. Barbour, the president, was present, and laid the matter before the board as an arrangement already agreed upon, and only wanting its formal sanction. The details of the arrangement were not stated by Barbour, and under the circumstances we may reasonably infer that the members of the board who were present understood them. If the details were understood, there was no occasion for explanations, and a sufficient reason why none were made is furnished by the presumption that none were necessary. The answers of the bank admit that by the original agreement with Robertson, the appellants were to have an interest in the security, and do not assert that any fraud was practiced upon the directors by not disclosing that fact to them. Barbour is an intelligent and highly respectable witness, and it might have been shown by him what directors were present at the meeting, and whether they were acquainted with the nature of the arrangement which they sanctioned. We cannot infer that a fraud was committed upon the directors by the non-disclosure of the interest of appellants in the security, where no such fraud is asserted in the answer, and where no inquiry has been made of those whose testimony might establish or refute it. The allegations that the defeasance was fraudulently drawn by Barbour, so as to give to the appellants and the bank equal rights in the security, and that Barbour misled the board of directors in regard to its terms, are not sustained by the evidence. It is evident that Barbour drew the defeasance in accordance with what he understood was

the agreement, and he afterwards informed his co-directors that Robertson had executed the deed according to the understanding between the parties. As Mr. Beach, the cashier, knew nothing of the debt to the appellants, or of any arrangement by which they were to have an interest in the security taken, he nat-
[*64] urally supposed it was solely for the benefit of the bank. His error in this respect arose from his want of information. Graham was not present when the deed was executed, or at any of the conversations between Barbour and his co-directors subsequent thereto, and the bank cannot abridge the appellants' rights on the ground that its directors were misled by its president. The appellants did not mislead the bank, and they are not responsible for the conduct of its officers.

The bank further alleges that the defeasance was by mistake so drawn as not to express the true agreement between the parties. Written instruments are made to express the agreements of parties, and the safety of community requires allegations of mistake in them should be regarded only where the evidence is clear, free from suspicion, and entirely satisfactory. Parties after the lapse of time, and under other circumstances, may differ widely as to the terms of an agreement, and experience has demonstrated the necessity of preserving them in a repository more safe than the recollection of witnesses. A written instrument is made a repository for that purpose, with a distinct understanding that its contents are to be the sole and only evidence of the agreement, and that if difference should arise as to what they were, the instrument containing them is to be the criterion by which the rights of the parties are to be determined. We have in the case under consideration precisely the difference which the law so wisely endeavors to avoid in the use of written instruments. Robertson, after the lapse of years, and now he is endeavoring to extricate his sureties from liability, upon his obligations to the bank, says that the defeasance does not express the true agreement between the parties. With the defeasance in his possession he discovered no mistake therein until he failed to exonerate his endorsers from their liability. Barbour, who executed it, says that it was drawn in accordance with the verbal agreement.

The evidence shows that Robertson was desirous to have the bills of exchange held by the bank, and then past due, renewed, and that he was to give personal security for the payment
[*65] of the bills taken in renewal to the satisfaction of the bank. Graham, who owned a majority of the stock of the bank, desired to secure the debt due to his firm, and was willing to have the bank renew Robertson's bills upon satisfactory personal security, if his own debt was secured. A

memorandum of the arrangement was made, from which the defeasance was drawn, and although it was not signed, it was preserved by the bank, and would at least test the accuracy of Barbour's recollection in regard to the transaction. The bank has not produced the memorandum, and has given no satisfactory reason for withholding it. Under these circumstances, we are of opinion that the evidence is not of a character or sufficiently clear and satisfactory to establish a mistake in drawing the instrument selected by the parties to express their agreement.

The court below will ascertain the amount due the appellants for principal and interest and direct the lands held by Early in trust for the parties, according to their respective rights, to be sold without redemption. From the proceeds there will be deducted the complainants' costs in this court and in the court below, and the costs of sale; also the taxable costs of the complainant in the cross bill filed by the bank, and the costs of the sale made under the decree therein; the costs to be paid to the parties respectively entitled to the same. The residue of the proceeds will be divided *pro rata* between the appellants and the bank. Should a surplus remain after such division, the same will be paid over to Robertson, or to such person as may hold and be entitled to his equity.

Inasmuch as there is no claim for an account of rents and profits of these lands set out in the complainants' bill, we cannot direct any decree to be made in respect to them.

The decree of the court below is reversed and the cause remanded, with instructions to enter a decree in conformity with this opinion.

Decree reversed.

HENRY F. McCLOSKEY [*66]

v.

CYRUS H. McCORMICK *et al.*

1. BILL OF SALE—*cannot be contradicted.* Where a bill of sale was for a "lot of empty boxes and empty barrels (not including 442 tierces and 100 barrels of salt now in the pork house) and all other movable effects now in the pork house," cannot be contradicted by evidence to prove that it was intended that fifty other barrels of salt, then in the pork house, should not be included. The bill of sale is the agreement of the parties, and it must, like other agreements, speak for itself.

2. RECEIPT—*may be explained or contradicted.* A mere receipt may be explained or even contradicted, but it is otherwise with written agreements. A written instrument may be both a receipt and an agreement, and, in such case, the portion operating only as a receipt may be explained like any other receipt; but not so of the part which contains the contract of the parties.

APPEAL from the Circuit Court of Jo Daviess county; the Hon. BENJ. R. SHELDON, Judge, presiding.

This was an action of trover, brought by Cyrus H. McCormick, William S. McCormick and Leander J. McCormick, against Henry McCloskey, to the August term, 1864, of the Jo Daviess county Circuit Court. The plaintiffs counted for fifty barrels of salt. The defendants filed the plea of not guilty; upon which there was an issue to the country. At the October term, 1864, a trial was had before the court and a jury.

On the trial, plaintiff introduced as a witness *V. Sangfield*, who testified that the plaintiffs became the owners of the personal property which had been owned by John Bennett; that he was the agent of the plaintiffs, and had received from Nathan Corwith what he supposed was a correct list of the tierces and salt in the pork house; that A. E. Small, Esq., was the agent of the plaintiffs; that defendants had been negotiating with witness for the purchase of the pork house and of said personal [*67] property; that the pork house had been bid off by Bennett, who had not taken it; that McCloskey was to have that and the personal property in it for his bid of $1200, except the tierces and the salt; said sale was on execution against Bennett; that after this contract of sale, on the 28th day March, A. D. 1864, defendants' witnesses went to the office of said A. E. Small; said plaintiffs' counsel then asked witness to state what took place at the time in the office of said A. E. Small; to which the counsel for the said defendants then and there objected, and asked the said witness if any writing passed between any of the parties at the time, and if paper here shown witness is such paper or writing; that witness testified that the paper shown witness was at the request of defendant, made and delivered to said defendant when they were in said Small's office; that the signature thereto is genuine.

Thereupon, the counsel for the defendant did then and there object to the introduction of any oral testimony as to what took place at the time of sale, for the reason that the writing was the best proof thereof, and that no oral testimony could be admitted to vary or contradict the same, which objection was then and there overruled by the court, who did then and there admit the witness to testify as to what took place at the time of sale; to which ruling of the court, the counsel for the defendant then and there excepted.

The paper was in the words and figures following, that is to say:

Mr. H. F. McCloskey,

To C. H. McCormick & Co. *Dr.*

March 28, 1864.

To one brick warehouse, situated on the Walsh lot, adjoining the stone pork house; two large blocks; one small block; three large tubs; two small tubs; two lard boxes; one lard press; two

kettles and furnaces; one scale; lot of empty boxes and empty barrels, (not including 442 tierces and 100 barrels of salt now in pork house,) all other movable effects now in said pork house.

The above property included in and paid for this day as [*68] part of the sum of $1200, this day paid the sheriff of Jo Daviess county, Illinois, for purchase under execution of the southeast one-half of lot six, in Water street, in the city of Galena.

[Signed] C. H. McCORMICK & CO.,
Per A. E. SMALL.

Witness then testified that when he, the witness, specified the articles and mentioned 106 barrels of salt, that witness remarked "more or less;" that Small said that it made no difference, that the salt was not included. Witness further testified, after objection made and being overruled and the ruling excepted to by the defendants for the reasons above mentioned, that the defendant had afterwards told him "that he was even now;" that there was a surplus of fifty barrels of salt. Witness testified that he sold the scales several weeks before the sale was made to the defendant; that he did not know that the defendant knew of the sale; that he mentioned the matter to him, and that he told defendant that he could not return the scales; that he told defendant that he would write plaintiffs, and that he did write to plaintiffs.

Cross-examined: Witness testified that Mr. Small made the sale, and that witness took the money; that he furnished the memorandum of the salt to Mr. Small—the memorandum was for 106 barrels of salt, "more or less;" that Small said "that the salt was not included." Witness further testified that he sold the 106 barrels of salt for $2.75 per barrel; that it was worth $3.25 per barrel; that he sold the salt for all he could get for it; that he tried to sell the salt to two or three persons; that it was packer's salt, and not wanted in the Galena market at that time; that he could get no more for the salt he sold.

E. A. Small, a witness produced and sworn on behalf of the plaintiffs, testified that he was present when the writing was made; and therefore the counsel for the plaintiffs asked the witness to state what transpired at the time the writing was made, to which the counsel for the defendant then and there [*69] excepted, for the reason that the contract was in writing, and that oral testimony could not be admitted to vary or control the same; which objection was overruled by the court, and to which ruling of the court, the said counsel for the said defendant then and there took exception; and thereupon the witness testified that when the memorandum was made, Langfeldt brought the defendant to witness' office; that it had been previously agreed between

Mr. Langfeldt and the defendant that $1200 was to pay for the pork house and all the personal property except the salt and the tierces; that defendant said he thought he ought to have the scales; that Langfeldt said they were sold; that after the witness heard of the 50 barrels of salt, he met defendant near Lorrain's office, and spoke to him about it; that defendant said he had got the salt and intended to keep it; that witness afterwards went to see defendant at his office at the desire of plaintiffs; that Mr. Fleming was present; that witness told defendant that the plaintiffs had requested him to call upon defendant about that salt; that defendant replied that he had no moral right to keep the salt, but had a legal right, and should do so; that witness demanded the salt, and defendant peremptorily refused to deliver the same; witness Small further testified that he was attorney of the plaintiffs, and as such, signed the paper given to defendant; that plaintiffs ratified the act so far as the execution of the paper was concerned; that the sheriff gave defendant a certificate of sale of the pork house; that Sheriff's sale to Bennett had taken place when the paper given to defendant was made out and delivered; the sheriff's certificate was delivered to defendant at the time the memorandum in writing was made.

And, thereupon, the defendant moved the court to exclude from the consideration of the jury all the oral testimony given on the trial of said cause, relative to the sale of the personal property, for the reason that the written instrument was the best and only competent proof thereof; which motion was by the court [*70] then and there overruled, and to which ruling of the court, in overruling said motion, the counsel for the defendant then and there excepted.

The jury returned a verdict for plaintiff for the sum of $142.50. The defendant then moved the court for a new trial, which was overruled, and an exception taken, and thereupon the court rendered a judgment on the verdict. To reverse which, defendant prosecutes this appeal; and assigns for error the admission of parol evidence of the terms of the sale from plaintiffs to defendant, and in overruling the motion for a new trial.

Messers. GLOVER, COOK & CAMPBELL for appellant.

The court erred in permitting parol evidence to be given of the property actually sold by appellant to appellees.

The fact is that in this case the written contract of sale is changed and contradicted by parol evidence, and this without any pretense that the written contract was obtained by any fraud, or that it was not written just as the parties intended it should be at the time. *McEvoy* v. *Long*, 13 Ill., 150; *Lane* v. *Sharp*, 3 Scam., 572; *Harlow* v. *Roswell*, 15 Ill., 57; *Abrams* v. *Pomeroy*, 13

Ill., 133; *Henry* v. *Grove*, 12 Ill., 288; *Jackson* v. *McIntosh*, 31 Barb., 267; *Tiblets* v. *Percy*, 24 Barb., 39; *Blassom* v. *Grijfin*, 13 Barb., 569.

Messrs. Leland & Blanchard for appellees.

The memorandum does not purport to be either a deed of the real estate, or a conveyance of the personal estate. It is a mere bill of the articles, or bill of parcels, amounting to no more than a receipt for the $1200, a declaration in writing by Small, the attorney of the appellees, after the contract had been made, as to the articles of property which he understood were included. The signing his name by Small made the list no better than it would have been if he had handed it to McCloskey without signature, or had uttered the words merely, and they had never been [*71] written. Suppose Small had accidentally omitted one or more articles from the list in writing or conversation, at the time he wrote the list, would the acceptance of his list by appellants have precluded him from showing that he actually bought and paid for such omitted article or articles? *Blood* v. *Harrington*, 8 Pick., 552; *Graves* v. *Hamond*, 9 Barb. S. C., 480; *O'Brien* v. *Gilchrist*, 34 Maine, 554; *Sparks* v. *Kowls*, 17 Ala., 211; 1 Green. Ev., 2 Phillip's Ev., note 489, p. 682; *Powell* v. *Gatewood*, 2 Scam., 22.

If, in the last case, the quality of the tobacco could be proved to be different from that described in the writing, of course the quantity could be also.

The memorandum is neither a bill of sale, nor an agreement, and could only be used by Small as a memorandum to refresh his memory, like any other list of articles sold; and McCloskey could certainly have shown the list to have been correct. "The written memorandum was not the contract, and was only given to show to what objects the receipt at its foot applied." *Harris* v. *Johnson*, 3 Cranch, 318; *Terry* v. *Wheeler*, 25 N. Y., 520.

Mr. Chief Justice Walker delivered the opinion of the court:

It appears from this record that the sheriff of Jo Daviess county sold a warehouse and lot on execution against appellees. The purchaser failed to take the property and pay his bid. An agreement was then made between appellees and appellant, that the latter should become the purchaser, together with the personal property it contained, except some tierces and some salt. A written memorandum in the form of a bill of sale was made to appellant by appellees' attorney. It contained a list of property, amongst which was this item: a "lot of empty boxes and empty barrels (not including 442 tierces and 100 barrels of salt now in the pork house,) all other movable effects now in

[*72] the pork house." This written memorandum states that the property specified in the bill of sale, is included in and paid for by the $1200 paid the sheriff, for the purchase of the pork-house and lot. It is insisted that this bill of sale was executed in mistake, and included fifty barrels of salt, not intended to be sold. That instead of there being but one hundred barrels of salt, as received, there were one hundred and fifty.

It is insisted that appellant had the right to explain the bill of sale, and to show that no portion of the salt was in fact sold. It will be observed that but one hundred barrels of the salt and the tierces were reserved, and the other movable effects, then in the house, were included. The right to show the mistake is placed upon the ground that the bill of sale was in effect but a receipt, and as such, it could be either contradicted or explained. In that respect it speaks its own language.

If appellees were permitted to prove that this bill of sale contained articles not sold, it seems to us that it is not explaining a receipt, but contradicting an agreement or contract. It says that this fifty barrels of salt was sold to appellant, and it is proposed to prove that they were not sold. That would not be to show that the receipt would not specify the true amount, but it would be to contradict the agreement to sell a portion of the property. Cases have held that the receipt in a deed of the consideration money may be shown to be incorrect in amount, or that it was not paid, but evidence is not receivable to invalidate the legal effect of the instrument. Nor has it ever been held that it may be shown that a tract of land described in the deed was not intended to be conveyed, or a tract was omitted which should have been included. To do so, would be to contradict the written agreement of the parties. Where such mistakes occur, the only remedy is in equity.

It may be that the claim of this fifty barrels of salt is an ungracious one. But if so, the rules of law will not yield [*73] to relieve against hard cases. Until the Legislature shall authorize courts of law to reform contracts because of a mistake, they are powerless to afford relief.

The judgment of the court below is, therefore, reversed, and the cause remanded.

Judgment reversed.

GIDEON IVES and ELMORE DENNISON

v.

HIRAM MILLS and MARTHA A. MILLS.

1. HOMESTEAD—*abandonment when presumed.* An abandonment of the homestead will not be presumed from the fact that the head of the family has gone in search of another home, and being disappointed, returns to his old home.

2. SAME—*when mortgagee acquires right to.* A mortgagee of land to which there is "a homestead right," acquires no right to the homestead unless it is released in conformity with the statute, and if the owner of the homestead right, sells the fee in the land to another, subject to the mortgage and buys it back, the mortgagee gets no right to the homestead.

3. SAME—*when it can be reclaimed.* The homestead can be reclaimed by the vendor by canceling the sale with his vendee, and then the mortgagee would get no right to foreclose as to the homestead.

4. So when M, the owner of a house on lot on which he lived with his family, mortgaged the same to I, and afterwards sold to S, and left the premises, in neither case, released the homestead in pursuance of the statute, he can, on a reconveyance to him by S, and a return to the homestead, set up his homestead right, against proceedings by the mortgagee by bill in chancery to foreclose.

5. Though when M sold to S, S agreed he would pay the mortgage, not being made to I, the mortgagee, it had no binding force, and on a reconveyance by S, M, was rehabilitated to his original right.

ERROR to the Circuit Court of Mercer county; Hon. C. B. LAWRENCE, Judge, presiding.

This was a Bill in Chancery to foreclose a mortgage executed by Hiram Mills and Martha A., his wife, to Gideon Ives and Elmore Dennison, for lots three and four in block [*74] fourteen, in the town of New Boston, in Mercer county, to secure the payment of $685.45. The mortgage bore date April 9th, 1859. The bill is in the usual form to foreclose a mortgage.

The answer of the defendants admits the indebtedness and the execution of the mortgage and avers, that the lots mortgaged, were the homestead of the defendants, on which they resided at the time of making the mortgage, and now reside upon them; that he is a householder, having a wife named in the bill, and a family; that there is a house on the premises in which they resided and now reside; that the debt for which the mortgage was given, was not incurred for the purchase or in payment of the premises; that they are the owners of the property; that they have never released or waived their right to the homestead exemption, but now plead the same.

To this answer there was a replication and proofs taken from which it appeared that in the fall of 1859, Russ Scudder and his brother Lyman, traded a piece of land to Mills for these lots, promising to pay off this mortgage. Mills was to give them possession, so soon as he could move out, and he did give them posses-

sion in the spring of 1860, and went on to a farm about four miles off, and remained there from one and a half to two years. Mills got the Nebraska land of the Scudders to improve and make himself a home; that he did not move immediately and take possession of the land, as he alleged, he was not able. Russ Scudder moved into the the house in May, 1860, and remained in it until September, 1861. Mills and his family, lived on the lots when the bargain was made with Scudder, and had lived on them for some years.

When Mills left the farm he went to, he came back in August or September, 1861, to New Boston, and to the lots in question, the Scudders having traded them back to him, on his complaint that the title to the Nebraska land was defective.

[*75] At the time of the purchase from Mills, the Scudders gave him two months in which to investigate the title to the Nebraska land, the agreement being, if the title was not good, it was not to be a trade. Mills has resided on the lots since the first of September, 1861, with his family. The deed from Mills and wife to the Scudders, bore date November 11th, 1859.

The cause was heard on the bill, answers, replication, and the proofs, and a decree rendered for the defendants.

The complainants in the bill bring the cause here by writ of error, and assign this decree as error.

Mr. GEORGE C. CAMPBELL argued for the plaintiff in error.

Mr. JUSTICE BREESE delivered the opinion of the court:

The facts in this case are, that the defendant in error, being indebted to Ives and Dennison, to secure the same, on the 9th day of April, 1859, executed and delivered to them, a mortgage on lot three, (3) in block fourteen, (14) in Turner's addition to the town of New Boston, in the county of Mercer. It was the homestead of Mills, and the mortgage contained no waiver of it. Mills and his family continued to reside on the premises, until in the spring of the following year, when he removed to the country and rented a farm. In November previous, Mills sold to, or exchanged with one Scudder, the premises, for eighty acres of land in the Territory of Nebraska, but on ascertaining the title was defective, the contract was rescinded in August or September, 1861.

The plaintiffs now insist, that the defendants in error cannot claim the benefit of the homestead act, by reason of this sale to Scudders, and though the contract was rescinded, they were not thereby, rehabilitated to their former rights.

In one of the first cases decided by this court, under this homestead act, we held, that an abandonment of the homestead, will not be presumed from the fact that the head of the family

has gone in search of another home, and being disappointed, returns to the old home. *Kitchell* v. *Burgwin* [*76] *and wife*, 21 Ill., 40. In what way could the mortgage affect this right? What rights did the mortgagees acquire by this sale to Scudders? Did they acquire any, they did not possess before the sale? We think not, and as the defendant in error had the capacity to sell and convey his homestead free from the mortgage, the mortgage not containing any relinquishment of the homestead right, could not affect this right. It was inoperative as to it. The principles of the case of *Green* v. *Marks*, 25 Ill., 226, are applicable to this case, and must control it. The verbal agreement to pay the mortgage, was not made to the mortgagees and was not binding, and when the lot was reconveyed, such agreement was virtually rescinded, and by the reconveyance, the defendant in error was put in the position he occupied before he conveyed.

The judgment of the court below is affirmed.

Judgment affirmed.

LAWRENCE, J., having tried the cause in the court below, took no part in this decision.

MILTON T. WARREN *et al.*

v.

PLOWDEN H. BALL *et al.*

1. PARTNERSHIP—*dormant partner*. Where a person permits his name to appear as member of a partnership, or where, his name not appearing, he is nevertheless known as a partner, he continues liable, after his retirement, for debts to persons who have no notice of such retirement, and who have known him as a partner.

2. SAME. But notice of the retirement of a dormant partner is not necessary in order to protect him from liability, in subsequent transactions, with persons who have had no knowledge of his connection with the firm.

3. PLEADING—*partnership*. Where three persons were sued as partners on an instrument executed in the partnership name, and one of them filed a plea denying the partnership at the date of the note, to which the plaintiffs replied that the defendants were partners prior to the making of the [*77] note, and that they received it from one of the defendants without notice of the dissolution. *Held* that the replication was bad, in not averring that the defendant had been known to the plaintiffs as a member of the firm, the declaration disclosing that he was sued as a dormant partner, his name not appearing in the style of the firm.

Appeal from the Circuit Court of Bureau county; the Hon. M. E. HOLLISTER, Judge, presiding.

This was an action of assumpsit, brought by the appellees against the appellants, as partners, at the March term, 1863. On a demurrer to the replication, there was final judgment for the

plaintiffs, and the defendants appealed. The facts appear in the opinion of the court.

Messrs. FARWELL & HERNDON for appellants.

The replication is clearly bad:

1. It should have tendered an issue on the plea.
2. The issue it does tender as to notice of the dissolution at the time of making the note, is entirely immaterial.
3. It is argumentative.

No question is raised as to the regularity or sufficiency of the plea.

As to the question of notice, if notice is at all necessary, it should appear from the replication, that the appellees knew at the time of their taking the note, that Warren was or had been a member of said alleged firm of Anderson, Halsey & Co. Warren's name no where appears in the name and style of said firm. It no where appears that the appellees, at the time the account accrued, or at the time the note was given, knew that Warren was a member of said firm. How can it be contended, then, with any show of reason, that the appellees are in any way injured by not being notified that Warren had ceased to be a member of said alleged firm? Warren never was individually credited. The original credit was not given on his individual responsibility. It could not have been because appellees did not know him to be in the firm.

[*78] We call the attention of the court particularly to the reasoning of the court in the case of *Kennedy* v. *Bohannon*, 11 B. Monroe, 120.

Also, to the case of *Brisbane* v. *Boyd*, 4 Paige C. R., 22, where the court say: "The want of knowledge of the dissolution of partnership cannot benefit a customer who loses nothing by his ignorance of the fact."

Also, to the case of *Davis* v. *Allen*, 3 Comstock, 172, where the court say: "But in order to render him (a retiring member) liable, it is necessary that he should have been known as a member of the firm to the plaintiff."

Also, to the case of *Bernard* v. *Torrence*, 5 Gil. and Johns., 384, where the same point is decided.

The rule requiring a notice of dissolution, if such rule does exist, proceeds upon the idea that the credit is given upon the responsibility of the individual partners. Therefore, as in this case, Warren is not liable on the note, although no notice was given, for the reason that the appellees do not pretend that they gave the note, or the original credit on the responsibility of Warren, or that they knew of his connection with the firm.

The note sued on was given for the account which was also

sued upon, after the dissolution of the co-partnership. Therefore, the note was not given in the usual course of business, and was not binding on the firm. 3 Pick., 177.

The case of *Joseph* v. *Fisher*, 3 Scam., 138, referred to by appellees, does not help them. The rule as established by this court in such cases as appears from 3 Scam., is that where part of the goods were furnished when the partnership existed, and the balance after the partnership had ceased, that then in such case all the partners would be liable, in case no notice was given.

That is the law—no notice is required, except in cases where new credits are given and new liabilities are made in ignorance of the dissolution. In this case no new credit was given. It was a fraud on the part of Halsey to give the note sued on. It was folly on the part of the appellees to receive the note. They had the account—the note put them in no better condition. [*79]

Dealers who *trusted* the firm after dissolution without notice thereof are protected, but where the name of the firm is altered, the vendors cannot hold the members of a different firm liable, because they have not been informed of such dissolution. *Kirby* v. *Hewitt*, 26 Barbour, 608.

One partner cannot, after dissolution, renew a partnership note so as to bind the firm. *Folz* v. *Powrie*, 2 DeSau., 40.

An acknowledgment made by a partner after dissolution, is not evidence to affect the right of his co-partners. *Miller* v. *Nureneck*, 29 In., 172; *Berryhill* v. *McKee*, 1 Humphrey, 31.

One partner, after dissolution, cannot by a new contract in the firm name, bind his co-partners, even where the consideration is a debt of the firm. *Hurst* v. *Hill*, 8 Md., 399; *Speake* v. *White*, 14 Texas, 364.

We also wish to refer the court to *Clapp* v. *Rogers*, 2 Kernan, 283.

Mr. J. I. TAYLOR, attorney for appellees.

A fact pleaded under protestation is admitted in that suit to be true, and is unavailable in the suit in which it is pleaded. 1 Chitty's Plead., 216.

A repugnant, inconsistent, or idle protestation, does not vitiate the plea, even though it be shown for cause of demurrer. 1 Chitty Pl., 617; 19 Johns., 96; 1 Blackf., 216.

Notwithstanding defect of pleading demurred to, the court will give judgment against party whose pleading was first defective in substance. 1 Chitty Pl., & Note (1).

A partnership once having been shown to exist, it is incumbent on the defendant to prove notice of the dissolution of the partnership before he can be discharged from liability as partner. *Joseph* v. *Fisher*, 3 Scam., 138-9.

This court, in the case of *Whiteside* v. *Lee et al.*, hold that even notice of dissolution in a newspaper is not sufficent; in that case the court held this language, "*That knowledge of the dis-*
[*80] *solution before the receipt of the partnership note by plaintiffs, would be required to be shown.*" *Whiteside* v. *Lee et al.*, 1 *Scam.*, 550.

A partnership once formed, is considered as continuing as to third persons until notice of its dissolution. 7 Mis., 29; 1 Harr., 161; 18 Ill., 37—28; 17 Pick., 91; Coll. on Part., sec. 533; Chitty on Cont., 235; 22 Wend., 183; 3 Kent Com., 67.

Two partners in a mill dissolved partnership, and posted notices thereof in four or five public places in the town, one of the partners afterwards gave a note in the name of the firm, to a Bank, twelve miles distant—held that the notice was insufficient, and that the note was good against the firm. 9 Dana, 166.

By the English law, notice of the dissolution was required to be published in the *London Gazette;* in this country notice should be given in a newspaper in the county where the business was carried on, at least public notice in some reasonable way must be given. 6 Johns., 147.

Even an advertisement of dissolution in a newspaper is not sufficient unless it appears that party read it. Gow on Part. 308.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

This was an action brought by Ball & Griffin against the appellant, Warren, and his co-defendants in the court below, Anderson & Halsey, upon a promissory note, dated December 8, 1858, and alleged in the declaration to have been made by the defendants, as partners, under the name and style of Anderson, Halsey & Co. The appellant and Anderson filed a plea, verified by affidavit, denying the partnership. The plaintiffs replied that in 1857, and prior to the making of the note, the defendants were partners under the above style, and, protesting that they had not dissolved at the time the note was made, averred that the note was made by Halsey, and received by the appellees, without notice of the dissolution. To this replication there was a demurrer by the appellant, which the court overruled, and the appellant abided by his demurrer. This decision is now assigned for error.

[*81] The name of the appellant, Warren, did not appear in the firm in whose name this note was given. So far as these pleadings show, he was a dormant partner. The question, then, presented by this replication is, whether these plaintiffs were entitled to notice of the dissolution. That clearly depends upon whether, at the time the note was taken, they knew that Warren had been a member of the firm. Where a person permits

his name to appear as member of a partnership, or where, his name not appearing, he is nevertheless known as a partner, he continues liable, after his retirement, for debts contracted to persons who have no notice of such retirement, and who have known him as a partner, because they may well be supposed to have given credit in consequence of his connection with the firm. But notice of the retirement of a dormant partner is not necessary in order to protect him from liability in subsequent transactions with persons who have had no knowledge of his connection with the firm, for the evident reason that they cannot have given credit in consequence of his supposed liability. These principles are very clearly stated in Story on Partnership, sections 159—160, and are fully sustained by the adjudged cases. They are decisive of the case before us. The replication sets up a partnership prior to the giving of the note, and avers that the plaintiffs had no notice of its dissolution. It appearing that the appellant's name was not known in the firm, it was wholly immaterial whether the plaintiffs had notice of appellant's retirement or not, unless they had known him to be a member. Hence the replication is defective in not averring such knowledge. The proof of such an averment, on the trial, can be made, either by showing direct personal knowledge on the part of the plaintiffs, or by evidence that the connection of Warren with the partnership had been matter of such general publicity, as to justify the inference that plaintiffs were cognizant of it.

The demurrer to the replication should have been sustained.

Judgment reversed.

MILES W. CONWAY [*82]

v.

PHILANDER S. CABLE *et al.*

1. CONSTITUTION—*legislative power.* The legislature, by retrospective enactment, is powerless to divest an individual, of a vested right; but may require that acts shall be performed in the future; and declare that their omission shall subject an individual to the forfeiture of such a right.

2. TAX SALE—*illegal cannot be cured.* Where the officers, conducting a tax sale, omit essential acts, rendering it invalid, the legislature are powerless to cure the defect, and render the sale valid. And when such officers, by an agreement with purchasers to receive a portion only of the taxes due, at the sale, such agreement being illegal, a sale under the agreement is also illegal; and is not rendered valid by a subsequent law declaring the agreement and sale valid and binding.

3. SAME—*owner of lands incurs no forfeiture by illegal sale.* An owner of land incurs no forfeiture, by permitting his land to pass to sale for taxes, if the sale is not legally conducted. It devolves upon the purchaser to see, that all the requirements of the law have been observed, if he expects to acquire title at a tax sale.

4. LEGISLATIVE POWER—*cannot impose unreasonable terms to the assertion*

of a right. When a right has become vested, the legislature has no power to impose penalties, or terms as a condition, to the assertion of the right. Nor have they the power, where an individual has permitted his land to pass to a void sale for taxes, to enact that he shall not be allowed to assert his paramount title, as a defense against a tax title acquired at such a sale, without paying the redemption money.

5. TAX SALE — *curative legislation.* The act of the 21st of February, 1861, declaring that certain defenses shall not be made, to tax deeds executed after the adoption of the law, until the redemption money is tendered, does not operate upon sales made before its passage, but, if at all, only on subsequent tax sales.

WRIT OF ERROR to the Circuit Court of Rock Island county; the Hon. IRA O. WILKINSON, Judge, presiding.

This was a suit in Chancery, brought by Miles W. Conway, against Philander L. Cable and Cornelius Lynde, Jr., to the January term, 1863, of the Rock Island Circuit Court. The bill alleges that complainant had been for five years past, and then was, the owner in fee simple, of lots one, two, seven and [*83] eight, in block four, in an addition to the town of Moline, in that county, and during that time had been in actual possession, and occupancy thereof. It alleges that a fraudulent combination had been entered into, prior to the sale of lands for taxes in 1860, by the collector, supervisors, and school directors, by which purchasers were only required to pay, at the time of purchasing lands, or town lots for delinquent taxes, the amount due the State. That at the sale, defendants, under this arrangement, became the purchasers, for the taxes of 1858-9, and obtained a sheriff's deed for the lots, in December, 1862, under the sale.

The bill charges, that the sale was irregular in various particulars, such as, an insufficient assessment, an insufficient notice, and an invalid judgment, under which the sale was made; that the defendants became the purchasers at the sale, under the agreement, which was fraudulent, and only paid the taxes due the State. The bill prays that defendants be required to surrender the deed, and that it may be cancelled, and the deed and sale set aside, so far as it may affect complainant, and for a perpetual injunction and for general relief.

The defendants filed their joint and several answer. They admit that such an agreement was entered into, but say that they were to furnish the money necessary to pay the taxes due the State, on land they might purchase, which, with interest and expenses, was to be first refunded to them, out of redemptions, and the remainder of the proceeds of redemptions was to be divided amongst the parties. The answer also alleges, that there was a combination entered into by the citizens of the county, to prevent a sale of lands for delinquent taxes, and that it thereby became necessary that the agreement complained of should be made, to

prevent the success of the combination formed to prevent the sale.

It is likewise admitted, as charged in the bill, that there are defects, in not complying with the revenue laws, in conducting the sale of 1860, such as would prevent defendants from recovering the premises by ejectment. But it is claimed that these defects were cured by an act of the General Assembly, adopted [*84] on the 25th day of February, 1861. It declares that the arrangement entered into between defendants, and the officers conducting the sale, and managing the affairs of the county, is ratified and legalized. They also set up as a defense, and rely upon the act of the 21st of February, 1861, (Sess. laws, p. 170,) which declares that all deeds hereafter made for lands sold for taxes, shall be void if the taxes have been paid before the sale, or the land was not subject to taxation, or has been redeemed, or if the notice required by the constitution has not been given, or the description of the land was not sufficiently definite; and it declares that the validity of all such deeds shall not be questioned, in any suit or controversy, for any other cause, unless the party desiring to do so, shall tender to the claimant under such deed, or deposit in court for his use, the amount of redemption money now required by law, with ten per cent. interest per annum, from the date of the deed till the time of such tender or deposit. After which the validity of the deed may be questioned, in the same manner as was previously allowed by law.

A hearing was had in the court below, when a decree was entered as of January term, 1863. The decree finds that the deed made by the sheriff to defendants being subsequent to, is within the terms of subject to the statute, of February 21st, 1861, entitled "An act to amend the revenue law," and that said act is constitutional. The decree dismisses the bill. The case is brought to this court, by writ of error, to reverse the decree; and the following errors are assigned:

1. "The Circuit Court erred in rendering a decree against plaintiff in error, and in dismissing his bill."

2. "The Circuit Court erred in not rendering a decree in favor of plaintiff in error in said cause."

Mr. J. B. HAWLEY, and Messrs. B. C. COOK, and CHARLES M. OSBORN, for plaintiff in error.

1. That the construction contended for, even as to pros- [*85] pective sales, would render the act unconstitutional, and therefore cannot be admitted. This question is very fully discussed in Mr. Blackwell's work on tax titles, pages 100 to 112, inclusive, where all the leading authorities on both sides of the question are fully cited and discussed.

2. The sale is a contract between the government and the purchaser, and the Legislature has no power to amend proceedings or otherwise effect the sale after it is made. *Garrett* v. *Wiggins*, 1 Scam., 335; *Bruce* v. *Schuyler*, 4 Gilman, 221; *Marsh* v. *Chesnut*, 14 Ill., 223; *Billings* v. *Detten*, 15 Ill., 218; *Cowgill et al.* v. *Long*, 15 Ill., 202.

3. The proceeding under this sale was void, and the Legislature cannot make valid, a void proceeding. *McDaniel et al.* v. *Correll et al.*, 19 Ill., 226.

4. The law of 1861, can have no application to titles derived under this sale, the sale having been made before the law was passed. It being a primary rule in the construction of statutes not to give them a retrospective effect unless the words of the statute imperatively demand it, where it can be done without violating any constitutional provision, and here to give this act a retrospective operation, would violate the constitution of this State, and of the United States. We admit as to the simple question of the power of the Legislature to pass retrospective laws of this character, there has been some conflict in decisions, but in this State, this question is settled, and there never has been any variance in the rules laid down by our Supreme Court. *Garrett* v. *Wiggins*, 1 Scam., 335; *Robinson* v. *Rowan*, 2 Scam., 502; *Bruce* v. *Schuyler et al.*, 4 Gilm., 221; *Thompson* v. *Alexander*, 11 Ill., 54; *Marsh* v. *Chesnut*, 14 Ill., 223; *Billings* v. *Detten*, 15 Ill., 218; *Cowgill et al.* v. *Long*, 15 Ill., 202; *Kinney* v. *Sherman et al.*, 29 Ill., 521; *McDaniel* v. *Correll et al.*, 19 Ill., 226.

5. We think that the defendants have admitted away the whole case on their part. We understand them to admit that there is no valid judgment or precept on which to base
[*86] their deed; and, as we understand the decisions of this court on similar statutes, they have no title, and are not entitled to any benefit which the deed might give them, without showing both of these. *Hinman* v. *Pope*, 1 Gil., 131; *Curry* v. *Hinman*, 11 Ill., 428-9; *Garrett* v. *Wiggins*, 1 Scam., 335; *Scott* v. *Detroit Young Mens' Society*, 1 Doug. Mich. R., 121; *Latmer* v. *Lorett*, 2 Ibid, 204; *Rowland* v. *Doty*, 1 Harrington C. R., 3; *Doughty* v. *Hope*, 3 Denio, 595; *Tallman* v. *White*, 2 Const., 69; *Striker* v. *Kelley*, 2 Denio, 329; *Varrick* v. *Tallman*, 2 Barbour S. C. 117; *Beekman* v. *Brighan*, 1 Selden, 366; *Jochson* v. *Morse*, 19 Johns., 441; *Shoalwater* v. *Armstrong*, 9 Humph., 217; *Parker* v. *Smith*, 4 Black., 70; *Doe* v. *Himeleck*, 4 Black., 71.

MR. GEORGE W. PLEASANTS for the defendants in error.

1. This act is no more retrospective than is every law which

changes a rule of evidence or imposes a new condition upon the assertion of a legal right.

2. If it is retrospective, it is not, therefore, necessarily invalid or inapplicable.

While courts will not give such effect by *construction*, they cannot interfere to defeat the clearly expressed intention of the Legislature, unless the act, besides being retrospective, is also in the nature of an *ex post facto* law, impairs the obligation of a contract, divests a vested right, or otherwise exceeds the limit of legislative power. *Satterlee* v. *Matthewson*, 2 Peters, 380; *Town of Goshen* v. *Stonington*, 4 Conn., 210; Sedgwick on Stat. and Const. Law, 406 *et seq.*

The courts will sustain retrospective laws that are just.

3. This act does not impair the obligation of any contract. There is nothing in the nature of a contract between the purchaser at tax sale or the State and the owner. As against the latter, the whole proceeding is without contract—*in invitum*, and by arbitrary methods prescribed by the sovereign power. *Mather* v. *Chapman*, 6 Conn., 54.

4. Nor does it divest any vested right of the plaintiff [*87] in error. It expressly saves to him every right of property and every advantage of defective evidence of the adverse title that he had before. It merely changes a rule of evidence, shifts the burden of proof, and imposes a new but not unreasonable condition upon the exercise of his right to avail himself of errors of form.

This the Legislature has full power to do. *Garrett* v. *Wiggins*, 1 Scam., 337; *Fitch* v. *Pinckard*, 4 ib., 69; *Curry* v. *Hinman*, 11 Ill., 429; *Graves* v. *Bruen*, 11 Ill., 431.

It may give a *prima facie* effect to the deed alone as an instrument of evidence, without proof of judgment, process or other authority to support it. *Graves* v. *Bruen*, 11 Ill., 432; *Rhinehart* v. *Schuyler*, 2 Gilm., 473; *Pillow* v. *Roberts*, 13 Howard, 472; *Steadman* v. *Planters' Bank*, 2 Eng., 434.

The act in question is unlike those construed in the cases of *Marsh* v. *Chesnut*, 14 Ill., 223; *Cowgill* v. *Long*, 15 Ill., 203, and *Detten* v. *Billings*, 14 Ill., 218, in that it does not, as they did, purport to validate any imperfective proceedings, and absolutely cut off the right, of a party affected thereby, to impeach it. It is the difference between taking away a right, and imposing a reasonable condition upon its exercise.

5. The plaintiff in error, refusing to do equity, is not in a position to ask equity. The controversy is really between him and the county of Rock Island.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

It being admitted that the sale was insufficient to pass title or to constitute a defense to the bill, the question is presented whether a defense is given by either of those acts. The act of the 22d of February, 1861, in terms fully ratifies and confirms the arrangement entered into by the officers and the purchasers at the sale. It also declares that sales made and certificates given shall not be construed to be invalid, by reason of the arrangement, by the failure of purchasers to pay the amount of
[*88] their bids otherwise than as contemplated by the arrangement. It will be seen that the arrangement, at the time it was entered into, was illegal and without warrant of law. If, therefore, it has any validity, it must be by reason of this enactment. But few principles are better settled than that the Legislature is powerless to divest, by enactment, an individual of a vested legal right. That laws, prospective in their character, enjoining the performance of an act, and declaring that its omission shall subject the person omitting the duty to a penalty, is clearly within the legislative power, is equally true. And that the Legislature may pass a law authorizing sales for taxes subsequently made, to be on credit, there can be no doubt.

In such a case as the present, however, it seems to us, there can be no doubt that a citizen may permit his real estate to pass to sale for delinquent taxes, and rely upon the want of compliance with the law authorizing a sale. He, by the law then in force, incurred no forfeiture, by permitting his lands to be struck off at a sale for taxes, not conducted according to law. The purchaser was bound to see that all of the essential requirements of the law had been performed before he could acquire any title at a tax sale. This proceeding, by which an individual is deprived of his property, in a summary mode, and usually for but a trifling part of its value, has always been held, to require a strict compliance with the provisions of the law authorizing the sale. No one can imagine, that were a sheriff to sell real estate without a judgment, or an execution, that the Legislature could afterwards impose such a condition upon the owner, before he could make a defense to a suit for the recovery of the land. To do so, would be to transfer, by legislative enactment, the property of one person to another. We are unable to see any difference between an invalid sheriff's and an invalid tax sale. As well might the legislature attempt to impose conditions upon the assertion of title by a person who had executed a void
[*89] deed, when sued for the recovery of the land. Such legislation, under our form of government, has always been

supposed to be unwarrantable, as being opposed to the principles of natural justice, and depriving persons of their property contrary to due course of law.

In the case of *Marsh* v. *Chesnut*, 14 Ill., 223, a construction was given to two acts amendatory to the revenue laws. The act of 1849, which was under consideration, declared that all assessments of property for taxes, made in the year 1848, and previous years, and which were not completed within the time required by law, should be as good, valid and effectual as if made and returned in strict conformity to law. The court held that this enactment did not, in anywise, affect sales for taxes made previously to the passage of the law. The amendatory act of 1851 declared that when a county or township assessor had heretofore failed, or should hereafter fail, to complete his assessment in the time required by law, such failure should not vitiate such assessment; but declared it as valid and legal, as if completed in the time required by law.

This latter act was also held prospective in its operation. And the court say that unless it is imperatively demanded, the acts in question should not receive a construction giving them a retrospective operation. "They were passed long after the proceedings in the case were concluded. Laws of such a character ought not to have a retrospective operation. Under the law in force when the proceedings were had, the purchaser at the sale acquired no title to the land. The assessment being invalid, there was no foundation to support the subsequent proceedings. The owner had a perfect defense to any claim of title under them. He had only to point out the defect of the sheriff's deed. But if the provisions of these statutes are to retroact upon the proceedings, the case is entirely changed. What before was insufficient to pass title, became competent for the purpose. * * * Legislation of this kind may well be characterized as replete with injustice." The same rule was distinctly announced in the case of *Thompson* v. *Alexander*, 11 Ill., 54, upon a careful review of the authorities. [*90]

In all civilized governments, laws impairing the validity of contracts, and divesting the rights of property, are considered unjust and odious. And such enactments never receive such a construction, unless required by the language, when so plain as to admit of no other interpretation. In the case under consideration, the transaction was complete before the law was adopted, and the answer may have relied upon the defects, which are admitted to have existed, but are claimed to have been cured by the act of 22d February, 1861. To give it force, therefore would be to transfer the property of the former owner, not by force of a valid and binding sale for taxes, but by the declared will of the legisla-

ture, that his title should pass from him, and vest in the purchaser at a tax sale, which conferred no right. This the legislature have not the power to do, whether by direct and positive action, or by rendering valid and binding acts which were nugatory.

In the act of the 21st of February, 1861, no language is found applying in terms its provisions to previous sales. It relates to deeds made after the adoption of the law, but does not otherwise refer to previous sales, and hence we must conclude that it was only designed to apply to sales subsequently made, otherwise different language would have been employed. It may be so construed as to give it full effect, and have only a prospective operation. And we can hardly suppose that a different design operated upon the General Assembly in the adoption of the law. But to impose new terms and conditions, after the sale has been made, is so unjust that we cannot believe the Legislature would attempt to do so, even if it had the power. If they may impose these conditions to such a sale, they may impose others destructive to the rights of the owner, or they may impose them in any other case, as a condition upon which the party having a perfect right may interpose a defense. But when such a law is prospective
[*91] in its operation, all persons have the opportunity of avoiding its operations.

The cases of *Marsh* v. *Chestnut*, and *Thompson* v. *Alexander*, are in point, and settle this question. The court below, therefore, erred in dismissing the bill, and the decree must be reversed and the cause remanded.

Decree reversed.

James McNerney.
v.
Lucius Newberry.

Certiorari—*garnishee*. Where a petition for a *certiorari* under the statute, states that the petitioner had been summoned as garnishee in a number of cases, before the same Justice of the Peace, and was discharged after examination, by the justice, and had no knowledge a judgment was rendered against him until it was too late to take an appeal, and that the judgment was unjust, showing wherein, can have relief by writ of *certiorari*.

Error to the Superior Court of Chicago.

On the 6th of December, 1858, James McNerney filed an affidavit before DeWolf, a Justice of the Peace of Cook county, on which a summons was issued against Lucius Newberry, as garnishee of one N. H. Sanders, which was returned by the consta-

ble on the same day, served, by reading to Newberry. The case was continued to the next day at two o'clock, P. M., at which time it was called for trial, and the garnishee failing to appear, a judgment was rendered against him in favor of McNerney, for the sum of $65.87, being the full amount claimed to be due from Sanders. This appears from the transcript of the Justice of the Peace.

On the 28th of December, 1858, an execution was issued, which was recalled by a *certiorari* served on the justice issued from the Cook County Court of Common Pleas.

The petition, on which the writ of certiorari was granted, [*92] was dated January 14th, 1859, and is as follows:

Respectfully showeth unto your honor, your petitioner, Lucius Newberry, of the city of Chicago, that about the 1st of December last past, your petitioner was summoned to appear before Calvin DeWolf, Esq., a Justice of the Peace in the city of Chicago, in a number of cases as your petitioner believes, four or five, to answer as garnishee of one N. H. Sanders, at the suit of divers persons plaintiffs, in one of which said suits, James McNerney was plaintiff; that your petitioner appeared and answered that he was in no way indebted to the said Sanders, and was discharged as such garnishee; that very soon thereafter, this affiant, your petitioner, was called to the State of Connecticut upon business, and was absent in Connecticut, for several days, and immediately upon his return therefrom, went to Wisconsin; that including his absence to Wisconsin, he was away from Chicago, for several weeks; that his business was such as to make it very necessary for him to be away from Chicago, and gave him no opportunity to attend to business here; that since his return to Chicago, he is presented with an execution for the sum of $65.87 damages, and $5 or $6 costs, issued upon a judgment rendered against him on the 7th day of December last past, in favor of said James McNerney; that said judgment was rendered by said Justice DeWolf, upon the failure of your petitioner to answer as garnishee of said Sanders, as he now learns from the docket of said DeWolf.

And your petitioner further shows, that it appears that there were two writs of summons served upon him as garnishee of said Sanders, and in favor of said McNerney; that he answered when summoned, as to one at the same time with several others, the names of whom he does not now remember, but failed to answer as to the other summons in favor of said McNerney; that he being then discharged by said justice, did not suppose it was required of him to answer any further, or more fully, and gave the mat- [*93] ter no more attention until an execution was presented to him, and it was too late to answer or appeal from said judgment.

And your petitioner further shows, that he had no notice,

knowledge, or suspicion that he was obliged or required again to answer, or that judgment would or had been entered against him for want of answer, that he owed said Sanders nothing, and has nothing belonging to him in his possession, or under his control; on the contrary whereof, the said Sanders owed your petitioner several hundred dollars, and which your petitioner is unable to secure or collect. Wherefore, as your petitioner has had no opportunity of appealing said suit, he prays for a writ of certiorari to bring the same before your honor; and he further says, that he has a good and valid defense to the whole of said action on the merits, etc.

Subscribed and sworn to, etc., January 3, 1859.

Afterwards, at the February term, 1859, of the court, McNerney, by his attorney, Mr. Samuel Ashton, entered a motion to dismiss the certiorari and for a writ of *procedendo* to the Justice of the Peace, because of the insufficiency of the petition on which it was granted.

This motion was overruled and an exception taken.

The cause was tried and a verdict found for Newberry. A motion for a new trial was made by McNerney and refused, and exception taken. A judgment was entered on the verdict, to reverse which, McNerney prosecutes this writ of error, assigning as error, the refusal of the court to dismiss the certiorari.

Mr. SAMUEL ASHTON, for the plaintiff in error.

Mr. H. T. HELM, for defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was a suit before a Justice of the Peace, and taken by certiorari, to the Court of Common Pleas of Cook county. A motion was made in that court, to dismiss the certiorari [*94] for insufficiency of the petition, which the court denied, and on trial had, rendered a judgment for the defendant. The plaintiff brings the case here by writ of error, wherein the principal error assigned, is in refusing to dismiss the certiorari.

It is insisted by the plaintiff in error, that the petition is not in conformity to the statute, that the statute requires the petition should show that the judgment was not the result of negligence on the part of the petitioner, and this petition in fact, admits negligence.

The petition, so far as we can see, is in substantial compliance with the statute. It appears from it, that the petitioner had been summoned as garnishee in a great number of cases; that he appeared before the justice and fully answered, and was formally discharged by the justice, and went about his business which called him away from Chicago the place of trial, and which occu-

pied his attention for many days, he, during all the time, having no reason to suppose that a judgment had been rendered against him. The discharge by the Justice of the Peace, necessarily quieted the mind of the petitioner, and lulled him into security and inaction, which cannot be attributed to negligence on his part. The case shows there was no negligence. The judgment is shown to be unjust, by the fact, that he owed nothing to the party to whom he was alleged to be the debtor, and that he had nothing in his possession or under his control belonging to the debtor. The petition also shows why he could not take an appeal in the ordinary way, and that was because he did not know of the judgment, until it was too late to appeal.

We see no error in the record and must affirm the judgment.

Judgment affirmed.

WILLIAM L. BALLOU [*95]

v.

LUCRETIA JONES *et al.*

ESTOPPEL—*in pais.* Where the lessee of a town lot, having erected a building thereon, supported by posts set in the ground, under a provision in the lease that he might remove all buildings at the end of the term, makes a chattel mortgage upon said building, describing it as personal property, both he, and all persons claiming under him, will be held estopped from denying that such building is personal property, as against all persons claiming under said mortgage, and if the widow of the lessee has surreptitiously acquired the possession of such building, and holds it against the purchaser under the mortgage, she cannot protect her possession against an action of replevin brought by him, by setting up the title of the landlord, or a homestead right in herself.

WRIT OF ERROR to the Circuit court of Bureau county; the Hon. M. E. HOLLISTER, Judge, presiding.

This was an action of replevin brought by the plaintiff in error against the defendant in error, at the April term, 1861, of the Circuit Court of Bureau county, to recover possession of a building. The verdict and judgment having been rendered against the plaintiff below, he sued out a writ of error. The facts appear in the opinion of the court.

Mr. M. BALLOU for plaintiff in error.

1. The plaintiff in error insists that the property in controversy is chattel property, and for which trespass or trover would lie. 2 Kent Com., 341-1 and 4; 1 Chitty Pl. 149 note; 1 Chitty Pl., 159 note 1; 6 Greenl., 452; 1 Hill, 176-473; 2 Fairf., 371; 3 Fairf., 162.

Aside from the general character of the property as recognized in law, the defendants claiming the property through or under

William Jones, the mortgagee, whose deeds of mortgage thereof, to both Alvin Ballou and to Enos C. Matson, describe the property to be "goods and chattels," are estopped from denying [*96] the same to be chattel property. Wm. Jones would be so estopped from alleging contrary to the admission in his deed, and so would all others claiming the same through or under him. 3 Gilm., 533; 3 Caines R. 188; 10 Johns. R., 223.

2. As the defendants claim the property through Wm. Jones, the mortgagor, they cannot set up title in a third person to defeat the title acquired under the chattel mortgage executed by Wm. Jones. In case of a chattel mortgage, the mortgagee upon default, and the purchaser under such mortgage, acquire all the interest and title which the mortgagor had in the mortgaged property; and the mortgagor is estopped to deny the title of the mortgagee or purchaser, and he cannot defeat a recovery by showing title in a third person. It makes no difference to him what may be the rights of the mortgagee or purchaser, as against other persons. The mortgagee or purchaser under him, succeeds to all the legal rights of the mortgagor, and possession is one of those legal rights; and if Wm. Jones could not set up such title, the defendants claiming through or under him, can be in no better capacity to do it. 4 Gilm., 348; 3 Caines, 188; 10 John, 223.

3. Replevin will lie where trespass or trover would. 7 Johns. R., 143; Purple's Statute, 868, sec. 1; 1 Chitty Pl., 162, note 2; 1 Chitty Pl., 164, note 1; 1 Chitty Pl., 188, note (382).

Messrs. ECKELS & KYLE for defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

On the 1st of January, 1853, Eunice Lovejoy, as guardian of certain minor heirs, leased to one William Jones, now deceased, husband of one of the defendants in error, a certain lot in Princeton, for the term of three years, the lease containing a proviso, that Jones might erect such buildings on the premises as he should think proper, and have the right to remove [*97] them at the end of the term. Jones took possession and erected a small frame building, which he used as a residence and shop, the building resting on posts set in the ground. To this building he afterwards attached a bakery. On the 2d of September, 1857, he executed to one Matson a chattel mortgage on these structures, describing them in the mortgage as "goods and chattels," and on the 12th of September, 1857, he executed a similar mortgage to one Alvin Ballou, brother of the plaintiff in error. Between that date and the spring of 1858, he left, with his family, both the premises and the town, and after residing in Bloomington and Mendota for more than two years, returned to Princeton, and died in 1860, without again occupying, or, so far

as appears, claiming any interest in this building. On the 31st of July, 1858, Matson sold the building under his chattel mortgage, and Alvin Ballou became the purchaser. The property was then occupied by tenants of Jones, who seem to have attorned to Matson on the forfeiture of the mortgage to him, and, after the sale, to have attorned to Ballou. These tenants remained in possession until the expiration of their lease, in September, 1858, when one of them took a new lease from Ballou, and the property continued to be occupied under him or his brother, the plaintiff in error, to whom he afterwards sold, until September or October, 1860, when the tenant left, and while the property was standing vacant, Mrs. Jones borrowed the key from the person with whom it had been deposited, moved in, and took and retained possession. The plaintiff in error brought an action of replevin for the recovery of the property, and the verdict and judgment in the court below having been against him, he has brought the record to this court.

We see no ground whatever upon which this verdict is to be sustained. It is urged that the property is not personalty but realty. Without reference to the question of how it was annexed to the soil, it is sufficient to advert to the fact that it has been, from the beginning, treated as, and admitted to be, [*98] personal property, by all the parties interested therein. By the terms of the original lease between Lovejoy and Jones, it was to be personal property, and Jones gave the mortgages upon it as personal property, under which the plaintiff claims, and in that way obtained money or credit. If it had been realty he would have had no title to it, and to have mortgaged it would have been a fraud. It is perfectly clear that all persons claiming under Jones are estopped from denying that the building is personal property.

It is urged that Mrs. Jones is entitled to protection under the homestead law. Without considering the other legal objections to this proposition, it is sufficient to say that Mrs. Jones and her husband had been out of possession for more than two years, during which time the plaintiff in error was in possession, having properly acquired it under a mortgage executed by Jones, and neither Jones nor his wife having occupied or claimed the property as a homestead during that period. She then improperly intrudes upon Ballou's possession. She cannot be permitted to protect her possession acquired by a trespass, by setting up a homestead claim.

Neither can the defendant protect her tortious possession on the ground that the title to the property has vested in the owners of the fee. The original lease gave the tenant the right to remove all buildings, and in the absence of all evidence, it must be

presumed, as between the occupant claiming under the original lessee and third persons, that the tenancy has continued as it began. The possession of Ballou is sufficient *prima facie* evidence of his title to the property, as against all persons except the owners of the fee, from whom the possession was originally derived by Jones.

Reversed and remanded.

[*99]

ABRAHAM L. WINNE

v.

DAVID S. HAMMOND *et al.*

1. INSTRUCTIONS—*evidence is for the jury.* It is error for the court to instruct the jury as to what is not proved; that it is for them to determine; and if evidence tends to prove a fact, its consideration should not be taken from them by an instruction.

2. AGREEMENT—*what constitutes a factor.* Where a person employs another to sell goods and wares at a distant place, and agrees that the employee shall receive a certain sum yearly, and a stipulated portion of the profits for his services; and the employee is to select and rent a business house, and employ clerks and conduct the business; and all rents and expenses to be paid out of the proceeds, if sufficient; but if not, then by the employer; held that such an agreement constitutes the person conducting the business, a factor.

3. FACTOR—*his lien for wages and general balance.* Held that a factor has a lien on the goods and wares entrusted to him for sale, not only for his commissions, but for a general balance, for monies advanced, on account of the business.

4. CREDITORS OF THE PRINCIPAL—*must satisfy the factor's lien before they levy.* Creditors of the principal must discharge the factor's lien on the goods before they can levy their attachment, and subject the goods to their debts.

The factor has a special property in the goods of his principal, which will enable him to sue for and recover it, when wrongfully deprived of it, or to recover damages for injury done to it by others, or for its conversion; nor can a *tort feasor* question his title.

APPEAL from the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

This was an action of trespass, brought by Abraham L. Winne, against David S. Hammond, Sheriff, and John A Nelson, his deputy, in the Cook Circuit Court; and the declaration was filed to the January term, 1864. The plaintiff counts for a trespass in levying an attachment, upon a number of fire proof safes, as the property of Lewis Lillie, the defendant in the attachment. The plea of the general issue was filed, and this stipulation:

"It is hereby stipulated and agreed by and between the parties in said case, that the general issue may be filed by the said
[*100] defendants in this suit, and that any and all matters of defense or claim of title by either party, may be given in ev-

idence under said plea by said defendant, and *all objections* are hereby waived thereto by the said plaintiff.

Dated, Chicago, November, 19, 1863.

JAMES L. STARK, Attorney for plaintiff.
E. F. RUNYAN, Defendants' Attorney."

A trial was had before the court and a jury, at the February term, 1864, of the court.

The plaintiff, on the trial, introduced the contract made with Lewis Lillie, constituting him his agent or factor, as follows, to wit:

"This agreement, made this 23d day of September, 1862, between Abraham L. Winne, of the city of Albany, of the first part, and Lewis Lillie, of the city of Troy, of the second part,—witnesseth: That the said Winne agrees to *take charge of a store in the city of Chicago, Ill., for the said Lillie*, on the following terms: The said Winne is to receive for his services a salary, of twelve hundred dollars per year, which sum of $1,200 is hereby guaranteed by said Lillie. In addition thereto, the said Winne is also to receive out of the business, a sum equal to one half of all commissions at 25 per cent. on sales; such sales to be governed by the prices as detailed in the present printed list of prices, except as the right to sell at a different price has been provided for in this agreement. But in case the sales do not allow of a dividend of one thousand dollars over and above all expenses and salaries, (including said $1,200,) then said Winne is to have out of the net proceeds one hundred dollars additional to his said one-half of the net proceeds.

"Said Winne is to select and lease a store in said city of Chicago, take charge of the same, hire all necessary clerks and workmen for the same, take entire charge of the business *subject to the directions of the said Lillie;* all rents and expenses in conducting the business, all salaries of clerks, workmen, and all necessary traveling expenses, are to be paid out of the [*101] proceeds of the business, estimating such proceeds at 25 per cent. on sales. In case such proceeds of the business are not sufficient, then such *expenses to be borne by said Lillie.* It is understood, that sheet iron safes may be sold at a discount not exceeding 25 per cent., which discount is not to be accounted for in the net result of profit and loss, chilled iron safes may be sold at a discount from list prices in the discretion of said Winne, and are to be made by him only when the importance of the sale would appear to justify such discount. Bank locks may be sold at the discretion of said Winne, and the discount thereon not to be accounted for in the net result of profit and loss, expenses for filling and finishing safes and repairs of locks, are to be deducted

from the price at which such safes and locks are respectively sold, and such expenses are not to be accounted for in estimating the net result of profit and loss.

Witness our hands, the day and year first above written.

A. L. WINNE,
LEWIS LILLIE.

Witness: HAMILTON B. DOX."

On the trial, and after hearing the evidence, the court gave the following instruction for the defendants:

"That by virtue of the contract under which the plaintiff rendered the services for Lillie, the plaintiff was the agent and servant of Lillie, and not a factor, and that therefore the plaintiff was not, under the evidence in this case, entitled to any lien for his services, or for the general balance of account, and that they must find for the defendant."

The jury returned a verdict in accordance with the instruction, for defendants, and plaintiff entered a motion for a new trial, which was overruled, and exceptions taken; and a judgment rendered on the verdict, against plaintiff for costs. To reverse the judgment, plaintiff brings the case to this court by appeal.

[*102] The question presented for determination is, whether under the agreement between Lillie and Winne, the latter was a factor, and as such, held a lien on the goods entrusted to him for sale, for his wages and for a general balance for money advanced in the business; and if so, whether the court erred in giving the instruction.

Mr. JAMES L. STARK for appellant.

Mr. S. ASHTON for appellees.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

In this case, after the evidence was closed, the court instructed the jury that plaintiff was not a factor, under the contract with Lillie, and held no lien upon the property, and that they must find for the defendant. If there was evidence that plaintiff was a factor, or even if it tended to prove that he was, no matter how slight the evidence, plaintiff had the right to have it passed upon by the jury. If such evidence was before the jury, the court transcended its authority by taking it from their consideration; and was such an error as would require a reversal of the judgment.

It appears that plaintiff in error was employed by Lillie to sell his safes, at Chicago. By their agreement, plaintiff in error was to receive $1,200 a year out of the net proceeds of the business, and to receive a sum equal to one-half of all commissions

at twenty-five per cent. on the sales. If, however, the sales should fail to allow a dividend of one thousand dollars over and above all expenses and salaries, including the twelve hundred dollars, then plaintiff in error was to receive, out of the net proceeds, one hundred dollars in addition to his half of such proceeds. Plaintiff was to select and lease a store in Chicago, take charge of the same, hire clerks and workmen, conduct the business under Lillie, and the expenses to be paid out of the business.

The lease of the business house selected by plaintiff in [*103] error, was taken in the name of Lillie. The policy of insurance was effected in the name of plaintiff in error, covering the stock in the store. Safes were shipped by Lillie to, and were received by him, and Lillie, at different times, drew drafts for various sums, in the aggregate larger than the amount of the sales, which he accepted. He received of Lillie, in safes and otherwise, the sum of $21,345.91; and advanced to him by accepting drafts, the sum of $23,140.50; leaving a general balance in his favor of the sum of $1,795.58. Hatch having attached the safes in possession of plaintiff in error, he thereupon brought this action, to recover damages for the alleged trespass in seizing the safes under the attachment.

If, under these facts, plaintiff in error was a factor, he held a lien on the property, which authorized him to hold it until his lien was discharged. Then, was he a factor, and did he hold the property in dispute in that capacity? Jacob, in his Law Dictionary, defines a factor to be the agent of a merchant living abroad. He says a factor is authorized to act by letter of attorney, with a salary or allowance for his care. Bouvier defines a factor to be "An agent employed to sell goods or merchandize, consigned or delivered to him by or for his principal, for a compensation, usually called factorage or commission." Wharton, in his Law Lexicon, gives substantially the same definition. A factor is, then, the agent, for the sale of goods or merchandize for his principal, for compensation or a commission. Nor does it seem to make any difference, that he is compensated by a salary or a percentage on the sales. Nor does the name make any difference, but it is the nature of his employment that constitutes him the factor. No reason is perceived for holding that plaintiff in error was not a factor.

There seems to be no doubt that a factor, or agent of that character, has a lien on the property entrusted to his custody for his commissions, against his principal as well as others. In Parsons on Contracts, vol. 1, p. 84, it is said, a factor has a lien on the property in his hands, for his commissions, [*104] advances and expenses. Then there seems to be a lien on

the goods, not only for his commissions, but for expenses in conducting the business, and for advances made to the principal, or in the regular course of the business. No distinction is perceived between a lien for special advances, or general advances on account of business. Nor do the books seem to limit the lien to property acquired with the money advanced, but it seems to extend to all of the property, in his hands, against third persons. No hardship can accrue from the rule as between the principal and agent. It is reasonable and just. And as between the agent and third parties, there can be no injustice, as the agent has the exclusive possession, which is the *indicia* of ownership, and hence no one can be misled into giving others credit to the true owner, on the property.

In this case, the property was taken from the possession of plaintiff, without satisfying his lien. Nor does it change the relations of the parties, or vary their rights and duties, by taking the lease of the house in the name of Lillie. Plaintiff was still the agent, to sell the goods on commission, and not a mere clerk. This in no way gave to third persons any claim paramount to plaintiff's lien. He was in the actual possession, and that was at least notice to the world, of his rights in the property. It became the duty of defendants in error, to inquire and inform themselves of his rights, and to have paid him the sum for which he held his lien, before they could levy upon the property, and take it out of his possession.

The law is well settled, and the books all concur in holding that a factor has a special property in the goods of his principal, so far as they come to his hands. And it is by virtue of his lien. This special property gives him the right to sue for and recover it, if illegally dispossessed, or to maintain trespass, for injury it it may sustain by a wrong doer, precisely as if he was the general owner. Nor can a *tort feasor* question his title.

[*105] The instruction was clearly wrong, as it took the whole case from the jury, when there was evidence for their consideration. The judgment of the court below must therefore be reversed, and the case remanded.

Judgment reversed.

BENJAMIN S. PRETTYMAN and SAMUEL P. BAILEY
v.
JOHN BARNARD.

1. ANSWER IN CHANCERY—*exceptions to—effect of abiding by.* If a party to a suit in chancery, chooses to abide by his exceptions to an answer to his cross-bill, and which are disallowed, the answer is properly taken for true.

2. COLLATERAL—*deposit of—not payment.* Where notes of third parties

are placed in the hands of a creditor as collateral, but are not paid, the party depositing them, can claim no credit for the amount due by them.

3. REHEARING—*discretionary.* A motion for a rehearing in chancery, is addressed to the discretion of the court, and error cannot be assigned on refusing it.

4. DECREE—*reciting service of process—evidence of service.* Where the decree recites the fact that process was issued, and there is nothing showing it was not served, it will be considered as served, unless the party will file an affidavit, that he was not served.

5. ABSTRACT—*dismissal for want of—discretionary.* It is discretionary with this court, to dismiss a cause for want of complete abstract, or for non-compliance with a rule to furnish abstract by a certain time.

ERROR to the Circuit Court of Tazewell county; the Hon. JAMES HARRIOT, Judge, presiding.

This was a bill in chancery in the Circuit Court of Tazewell county brought by John Barnard against Abraham Brown and Amanda, his wife, Samuel P. Bailey and Benjamin S. Prettyman, to foreclose a mortgage executed by Brown and wife, to Bailey, on the 14th of October, 1853, and assigned by Bailey to Barnard. Prettyman was made a defendant on [*106] account of some supposed interest in the premises.

It appeared that Brown was the owner of the land mortgaged, and was indebted to Bailey in the sum of $16,400, by twenty-three promissory notes, twenty of the notes being each for $300, and payable in nine and a half and ten years from their date, and one note for $10,000, payable ten years after its date; one note for $200, payable January 1st, 1854, and one for the same amount due May 1st, 1854, and all of them dated October 14th, 1853.

On the 2d of October, 1855, Bailey assigned and delivered all these notes that were to be due after October 4th, 1855, and mortgage, to Barnard, the notes due before that day, having been paid.

Bailey in his answer, denies that Barnard has any interest in those notes, and alleges, that on the 2d of October, 1855, he became indebted to Barnard in the sum of $6,000, for which he executed his promissory note payable on demand with interest, and at the same time he assigned these notes of Brown, together with other notes for the purpose, that Barnard should, when he collected them, pay the note of $6,000, and if Bailey paid the note, Barnard was to surrender up all these securities. Bailey alleges that Barnard, at different times, received divers sums of money in payment of this indebtedness in cash, and part of other securities placed in his hands, namely: a note signed by M. Tackaberry, dated April 1st, 1854, for the sum of $384, and another note of the same date for $384.37, both of which Tackaberry paid at maturity. He also alleges that Barnard transferred to one Reuben Barnard, being part of the securities, two notes, one

due August 21st, 1857, for $3,019.9, and the other due August 21st, 1858, for $370.46, both notes signed by Benjamin Kellogg, Jr., and payable to Bailey, and which notes he alleges, are now in judgment in the County Court of Tazewell county in favor of Reuben Barnard. Bailey also alleges that Nathan P.
[*107] Walton being indebted to him in the sum of $3,200 it was agreed between him and Walton, that if Walton would pay Barnard the amount thus due, he, Bailey, would release him, and he avers that Walton did pay Barnard that amount in part payment of the $6,000.

Bailey further alleged that in the winter or spring of 1856 or 1857, his note was placed in the hands of Reuben Barnard as agent of John, for collection, and at the request of this agent, he drew a draft in favor of Reuben, on one James Miller, dated April 1st, 1857, payable sixty days after date, $1,000, which was paid and credited by Reuben, on the note while he was in possession of it. Bailey claims other sums as paid to Reuben Barnard which he specifies.

Bailey claims that Brown and wife, had released to him all their right in the premises mortgaged, by deed dated May 2d, 1856, and that they have no further interest in them, only that they shall stand as security for Brown's notes. Bailey claims that the moneys he has paid to Reuben are a set off against Barnard's claim against him, and expressly avers that the only consideration of the assignment of Brown's notes and mortgage was as a collateral to secure the note he had executed to Barnard for $6,000, and he asks for an account from Barnard.

A replication was filed to this answer, on the 20th of February, 1860, and on the 19th of June, 1860, Bailey filed his cross-bill against John Barnard, which is for the most part, a recitation of the statements contained in his answer to Barnard's bill, except as to the arrangement with Walton. In his cross-bill he avers that, in pursuance of the agreement he made with Walton, Barnard sold and transferred to Walton, $3,000 of his interest in this $6,000 note, on which, Walton agreed with Bailey that so soon as he could get his, Bailey's note, he would endorse on it this $3,000 and interest, but instead of getting the note from Barnard, and after contracting other indebtedness, Walton departed from the State, and he charges Barnard with combination with Walton to defraud him, and avers that he has paid the $6,000 note in full.

[*108] Barnard answered the cross-bill, denying all the material allegations in it.

Bailey filed exceptions to the answer, which were disallowed by the court.

At the September term, 1860, the court entered a decree recit-

ing orders of publication against Brown and wife, and that Prettyman had been served with process more than ten days before the first day of the February term, 1860, and process returned not found, as against Brown and wife, and found the sum of $3,526 still due on the $6,000 note, and directed, if the money was not paid in twenty days from the adjournment of the court, the mortgaged premises should be sold, etc.

At the same term Bailey made a motion to vacate the decree which was allowed, and on a rehearing, at the February term, 1861, the original decree was confirmed with a modification, that all the collaterals should be returned to Bailey on his paying the amount of the decree.

At the June term following, Bailey again applied for a rehearing, which the court refused, and Bailey excepted.

Bailey brings the case here by writ of error, and assigns the following as error:

1. The court erred in overruling the exceptions filed in said cause to the answer of the defendant J. Barnard, to the cross bill.

2. The court erred in not setting off the two Kellogg notes against the $6,000 note in the pleadings mentioned.

3. The court erred in not setting off the Miller draft of $1,000 in the pleadings mentioned against the said $6,000 note.

4. The court erred in not granting a rehearing upon the petition of the said Bailey.

5. The court erred in entering a decree against B. S. Prettyman without his having been served with process.

6. The court erred in not compelling John Barnard to account for and deliver up the notes of Nathan P. Walton.

Mr. B. S. PRETTYMAN for the plaintiff in error. [*109]

Mr. C. A. ROBERTS for the defendant in error.

Mr JUSTICE BREESE delivered the opinion of the court:

In this case, when considered in conference, it was found the abstract and brief of plaintiffs in error were so imperfect and unintelligible, that we caused a rule to be entered against them, and a copy served on them by the clerk, that if a proper and intelligible abstract and brief were not furnished within sixty days from the day of entering the rule, the writ of error would be dismissed. There has been no compliance with this rule, and more than sixty days have elapsed since it was entered. We might, therefore, with propriety, dismiss the writ of error.

If however, we are to decide the case on the abstract and brief furnished, we have no hesitation, if we understand them, to affirm the decree, as no error is pointed out sufficient to reverse it. Bai-

ley chose to abide by his exceptions to defendant's answer to his cross-bill, which being disallowed, and no replication put in, the answer was properly taken for true, and thus the whole case was disposed of. None of the exceptions, as we understand them, were well taken, and the court did not err in disallowing them.

As to the Kellogg notes, it is shown they were received merely as collateral security, and having never been paid, Bailey could claim no credit on the note and mortgage for their amount. As to the alleged indebtedness of defendant in error to Walton, that is expressly denied in defendant Barnard's answer. Both the Kellogg notes and Miller draft, as the receipts show, were, when paid, to be credited on the note of $6,000, but not otherwise. Not having been paid, they could not be set up as a credit, or as a set-off.

The motion for a rehearing was addressed to the discretion of the court, and there was no error in refusing it. In the absence of a replication to the answer of Barnard to Bailey's cross-bill, the answer was properly held to be true, and disposed of the case.

[*110] The record shows all the parties were served with process, and a proper rule to answer taken against them. If the summons has been lost from the files, the defendant in error should not be prejudiced thereby. The decree recites the fact that process was served, and there is no evidence it was not served. There is no affidavit of Prettyman in the record that he was not served with process. He appeared in the cause as solicitor for Bailey and for himself, and cannot now say, he was not served with process. It does not appear that Prettyman had any interest in the suit. He appears to be a nominal party merely.

With the best understanding we can get of this case from the imperfect manner in which it is made up and presented, we are satisfied the decree was right, and that it should be affirmed.

Decree affirmed.

HARVEY B. LEPER
v.
EDWARD F. PULSIFER.

TAXES—*assessment of—penalties for fraudulent return of property.* An assessor for taxes, being of opinion that a resident of his township had made a false return both of his own personal property and of that belonging to an unsettled estate of which he was executor, largely increased the valuations, and then affixed the penalty provided by the statute for a false return, by doubling the increased valuations. The owner of the property was notified of these proceedings, and of the time and place of meeting of the board for the correction of lists. He appeared before the board, but refused to make the affidavit required by the statute as to the true value of his property. The board did not interfere, and he then filed a bill to enjoin the collection of the taxes, but did

not aver in his bill, nor prove, upon the hearing, that the valuation affixed by the assessor was too high. *Held*, that the action of the officer, proceeding within the scope of his official authority, must be presumed to have been correct, until the contrary is duly alleged and proven—that this was not a case calling for the interference of the court, so far as related to the increased valuation of the personal property, whether belonging to the complainant in his own [*111] right or to the estate, nor would the court interfere with the penalty affixed to the personal property held by the complainant in his own right; but the assessor had no power, under the statute, to double the true valuation of the property belonging to the estate, in consequence of fraud in the executor, nor had he any right to double the valuation of any real estate which might be listed in the name of the complainant.

WRIT OF ERROR to the Circuit Court of Putman county; the Hon. SAMUEL L. RICHMOND, Judge, presiding.

This was a bill for an injunction, filed at the March term, 1862, of the Circuit Court of Putnam county, by defendant in error, against plaintiff in error, to restrain him from the collection of certain taxes, in the township of Hennepin. The case was heard upon bill, answer, replication and proof, and the injunction being partially allowed as prayed, the defendant below sued out his writ of error. The facts are fully stated in the opinion of the court.

Mr. T. M. SHAW for the plaintiff in error, filed the following brief:

1. There was no equity on the face of the bill, and the court should have dissolved the injunction on motion.

(A) Complainant did not show or allege in his bill the value of his taxable property, and without such showing he could obtain no relief.

(B) He had an adequate remedy at law, and shows no sufficient excuse for not pursuing it. Stat., Ill., 1056, Sec. 32 and 33.

The time of the meeting of the board of equalization is changed, and assessor is required to post notices of such meeting. Haines' Township organization, 1861, p. 59, Sec. 11, 12 and 13; *Hough* v. *Hastings*, 18 Ill., 312.

(C) Complainant gave in a false and fraudulent list, as decided by the assessor, whose decision was final, and it was the duty of assessor to assess his property at double its value as a penalty. If he failed to impose the penalty, he was liable to a fine of $50. Stat., Ill., 1050, Sec. 8.

(D) He refused to list his stocks in Hennepin Semin- [*112] ary, and the bill does not show that the premises were not "leased or otherwise used with a view to profit," and the presumption is that they were, in the absence of any allegation in the bill denying it. He cannot plead ignorance of the law; and this re-

fusal warranted and required the assessor to impose the penalty. Stat. Ill., 1030, Sec. 3.

(E) It was the duty of the assessor to assess his "*property*" at double its value. This would include real property, and it there could be any doubt of the meaning of the word, see Stat. Ill., 1047, end of Sec. 2.

(F) Assessor had the right to make the assessment from his own knowledge, and from reputation, and was not bound to call witnesses. Stat. Ill., 1058, Sec. 37.

(G) This is not one of cases in which the court will interfere within the rule laid down in *C. B. & Q. R. R. Co.* v. *Frary et al.* 22 Ill., 36.

(H) The legacies not being invested still remain a part of the estate, and by adding them to the amount of the estate proper, only made a little over $30,000, which was the amount of moneys and credits the assessor found the whole estate to be worth; and even if they were not taxable, there was an ample remedy by application to the board of supervisors, and appeal to the state auditor. Stat. Ill., 1056, Sec. 33.

(I) If it was illegal to double the real estate, the judgment could be resisted in the county court or elsewhere, inasmuch as the illegality appeared upon the face of the books.

2. The court clearly erred in striking cross-bill from the files. Defendant had the right to file it. (Stat. Ill., 141, Sec. 24,) and the only ground on which the motion was sustained was, that he could not be compelled to make discovery of matters which would subject him to a *penalty*. And he thus refuses to give in his lists, under oath, refuses to state the value of his property in bill; seeks to avoid answering as to the same in the cross bill, and at the same time seeks to impeach the assessment, which he alleges to be unjust. The rule is not applicable in this case. The
[*113] discovery will not subject him to any penalty, but the evidence thus obtained might dismiss his bill. That would be all the penalty.

3. The merits upon the evidence, giving the answer the weight to which it is entitled, is clearly against defendant in error. Plaintiff in error made but little effort by evidence, to show the value of his personal property, as it was difficult to do, and counsel felt confident that complainant would be compelled to answer cross-bill.

4. The acts of the assessor are, in their very nature, and from the necessity of the case, *judicial*, and *not* ministerial acts, and therefore could not be reviewed or impeached in any manner, except that pointed out in the Revenue Laws, unless, *perhaps*, for fraud on the part of the assessor, and none is shown here.

To say that they are ministerial acts, would give rise to the very evil deprecated in *C. B. & Q. R. R. Co.* v. *Frary*, 22 Ill., 36.

Messrs. ARRINGTON & DENT for defendant in error, submitted the following points and authorities:

It is necessary to consider only two of the matters assigned as error:

1. The overruling of the motion to dissolve the injunction.
2. The rendition of a decree for the complainant, now the defendant.

These present a question as to the right of the complainant to have any relief; and in support of the affirmative, the following considerations are offered:

The court below decreed that he should be so far relieved from an assessment of taxes as not to be required to pay the same upon one hundred per cent. penalty or addition to the value of his property, and also so far as not to require him to pay taxes on certain bequests made by the will of his father.

When called upon by the assessor, he gave a list of his [*114] personal property to be assessed, except as to $427.50 of stock invested in a seminary of learning, which stock, as he told the assessor, he declined to list, not considering it taxable. Also, as executor of his father's estate, he listed moneys and credits to the amount of $2,700.

To these lists, the assessor made additions, by including said seminary stock, and adding $25,000 to the moneys and credits listed by Pulsifer, and by increasing the valuation of the moneys and credits of the estate of the elder Pulsifer to $27,000, and also by adding to the latter list certain specific bequests, amounting to $7,900; and then, under the allegation that the defendant in error had *refused* to list his personal property, the assessor doubled all the valuations as well of real as of personal property. This the assessor seems to have done July 6, 1861, according to his notice of that date to Pulsifer.

1. It was not right nor in conformity with law, for the assessor to assess the property of the defendant in error at double its real value.

First, It was for the assessor and not for the owner of the property to assess the value of the property. (Township Organization Law, Public Laws, 1861, pp. 241-2, section 7, of Article 16.) He had a right, to be sure, to get information thereof from Pulsifer; but there is no pretense that the latter refused such information. He declined to list the seminary stock for the reason before advanced; and as to his "moneys and credits," no inquiry as to the particular items of the same was made of him by

the assessor, and, as the bill asserts, the valuation was a matter of opinion, about which persons might honestly differ.

Second, But if it was the duty of Pulsifer to set a value upon his moneys and credits, and the value was too low, then the remedy was pointed out by the 9th section of the act of Feb. 12, 1853, concerning the assessment of property, &c., (p. 1050 [*115] of Scates' Comp.; p. 940 of Purple's Comp.;) this section authorizing the assessor in such case to assess the property at its *true* value.

And if the declination to list the seminary stock was wrong, still it is not pretended that Pulsifier concealed any information in regard to it, or did more than to urge that it ought not to be assessed. This was a matter addressed to the judgment of the assessor, and the 30th section of the same act, (p. 1056 of Scates' Comp.; p. 945 of Purple's Comp.,) directed him how to proceed, if he needed information as to such stock, as it seems he did not.

Third, When the assessor made his additions and arbitrary increase of valuations, it was too late to do so. The law, p. 242 of Public Laws of 1861, sec. 8, required him to assess the value of the property before the *first day of July*, and to complete the assessment roll before the first Monday in that month; (Ib., sec., 11.) The latter time in that year, was the first day of the month. But he waited until the Saturday thereafter, the 6th of the month, before making these additions.

Fourth, If the legacies were taxable, they should have been assessed to the legatees. Pulsifer, as executor, was not bound to pay taxes on them. It was enough to charge him with taxes on the value of the property of the estate.

Fifth, There is no penalty for not listing lands; and the law does not declare that individual owners shall give the assessors lists of the same. They were to be assessed once in every two years; and according to the theory of the assessor, they, in this case, would have been charged at double their value for 1862, as well as for 1861.

Sixth, The additional assessments were arbitrary, and not based upon proper testimony. No witnesses were sworn. (Sec. 30 of same act, p. 1056 of Purple's Comp.) The assessor could have got all required information of Mr. Pulsifer, and could have had him sworn.

[*116] 2. The allegation of the bill that the assessor acted from passion, malice or prejudice against the complainant is sustained by the evidence.

All the circumstances show that such was the case. He seized the pretext of the seminary stock not being listed, and pretending to differ in judgment with Pulsifer as to that, but asking from him no information otherwise, talked with persons

alleged in the bill to be unfriendly to the complainant, and on their unsworn statements, made the additions, and gave notice of them to Pulsifer, and to make sure of stamping the latter with infamy, wrote on the assessment of the personal property, that he had doubled the value of the property for *refusing to list the same*, and on the assessment of real property, opposite each tract, that he had assessed it at double its value, "*as a penalty for giving a false list.*"

3. The complainant was not required to make any affidavit at the meeting of the assessor and town clerk.

First, Because the arbitrary action of the assessor, in doubling the valuations, could not be remedied at that meeting.

Second, The meeting being held July 19th, was not held in time. It should have been held early as the 15th of July,—that is, within fifteen days after the first Monday of July, 1861. Public Laws, 1061, p. 242.

Third, The assessor decided to double valuation if Pulsifer should make any affidavit as to what his property was worth; and the town clerk did not dissent. And a witness said he did not think the board had anything to do with the doubling. Hence the case was prejudged.

Fourth, When the supervisor arrived at the place of meeting, the office of the town clerk, where the meeting was being held, was about to be closed, it being the usual [*117] time for closing the office in the evening.

4. The answer did not aver that at the utmost stretch the property was worth more than the price fixed by the assessor, without the 100 per cent. penalty, and there was no evidence tending to show that the valuation which Pulsifer first put upon it was inadequate. That valuation was presumably correct; and it was for the plaintiff in error to show that it was not, if he so believed. The volunteers, of whom the assessor inquired, could readily have been summoned, if the assessor had chosen to enter upon the investigation. The answer is not at all supported in this respect; and the court below did less for the complainant than the law entitled him to demand.

5. It was in harmony with all the decisions of this court, and with general chancery law, to give relief to the complainant. A penalty had fraudulently and unjustly been imposed; taxes had thus been wrongfully and illegally charged, without right, casting clouds upon the title to his real property; and an investigation, which could not be properly made in resisting a judgment for taxes, had become requisite. An injunction bill was the most appropriate weapon for redress. 21 Ill., 610; 22 Ill., 169.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

In 1861, the assessor of Hennepin township, called upon Pulsifer, the defendant in error, to furnish him with lists of his personal property for taxation, and also of the personal property belonging to the estate of his deceased father, of which he was one of the executors. Pulsifer furnished the lists, valuing his own personal property at $11,608, and that of the estate at $2,700. The assessor, not being satisfied with these valuations, increased the former to $25,000, and the latter to $27,000, as the true [*118] estimated value, and then, under section eight of the revenue law, doubled these amounts as a penalty. He also doubled the valuation of Pulsifer's real estate. He also examined the will of the deceased Pulsifer, and finding that it provided for sundry bequests amounting to about $8,000, he doubled this sum, and added it to the amount already assessed against the estate. He gave Pulsifer notice of what he had done, and of the time and place of the meeting of the board for the correction of lists.

Pulsifer appeared at the meeting of the board, but refused to make an affidavit, as required by the thirty-second section of the revenue law, to the effect that his personal property did not exceed a certain sum, and in consequence of such refusal, the board did not reduce the assessments. Pulsifer afterwards sued out an injunction to restrain the collection of the taxes on these assessments, and, on the final hearing, the Circuit Court relieved him of the penalties, and of the taxes on the legacies, but refused any relief as to the increased valuation. The tax collector brings the case to this court.

So far as relates to the tax levied upon the personal property of the complainant, held by him in his individual right, he has not made a case entitling him to relief either in his bill or in his proofs. The bill, being for an injunction, was necessarily verified by affidavit, and it nowhere contains an averment that the valuation of $25,000 fixed by the assessor, was over the actual value of the complainant's personal property, and there is not the slightest attempt to show this by the evidence. The only averment in the bill upon this point, is as follows:

"That complainant did make such lists, and they were not false or fraudulent; because there was no complaint that he had omitted any taxable property in his lists, except said stocks, but that he had not valued his moneys and credits, and the moneys and credits of said estate, as high as the assessor did; that valuations are matters of opinion, about which men equally honest differ."

[*119] This can only be regarded as evasive and frivolous. The

complainant comes into court asking relief from what he alleges to be an excessive assessment. Yet how can he hope for the interference of the court, unless he is able to aver distinctly, and to show presumptively upon the hearing, that there has been such excess? Unless he can do this, what standing has he in court? The law gives the assessor the right to value personal property if dissatisfied with the value fixed by the owner. This assessor exercised that right. As an officer of the law, vested with an authority to a considerable extent discretionary, and acting within the scope of that authority, his action must be presumed to have been correct until the contrary is duly alleged, and so far proven as to repel the *prima facie* presumptions which attach to and protect official action performed within the scope of official authority. Yet this case, so far as it relates to the personal property of the complainant, proceeds in defiance of these familiar principles. And not only are the bill and proof fatally defective in this regard, but there is another circumstance in the case which furnishes a powerful reason why the court should refrain from interference on behalf of this complainant personally. The thirty-second section of the revenue law of 1853, provides that, on a certain day, "the assessor, town clerk and supervisor shall attend at the office of the town clerk for the purpose of receiving the assessment list, and on the application of any person considering himself aggrieved they shall review the assessment, and when the person objecting thereto shall make an affidavit that the value of his personal estate does not exceed a certain sum specified in such affidavit, the assessor shall reduce the assessment to the sum specified in such affidavit." Now this complainant appeared before the board—was informed of this law—was told that if he would make the affidavit, they would fix his assessment in conformity thereto, and, upon some frivolous pretext, he refused to make an affidavit, and the board, after waiting upon him a week, closed and returned the books. He had the means of redress in his own hands, if he had really been aggrieved, and declined to adopt them. From his refusal to make an [*120] affidavit at that time, from the fact that in his sworn bill he was unable to approach more nearly to what his counsel must have known was a material averment than the evasive statement we have already quoted, and from the fact that he offered no evidence whatever on the hearing tending to show an excessive valuation, the inference is irresistible that the valuation was not too large, and in the face of all these facts, it is folly to expect the interposition of a Court of Equity.

While, however, in regard to the personal property owned by Pulsifer in his own right, the assessor seems to have only done his duty, he wholly transgressed his power in the residue of his

action He had no right whatever to double the assessment of the real estate.

Section eight of the revenue law of 1853, page 1050 of Scates' Statutes, provides that "if any person shall give a false and fraudulent list, or shall refuse to deliver to the assessor, when called on for that purpose, a list of his or her taxable property, as required by law, the assessor, as a penalty therefor, shall assess the property of such person at double its value." Now it is true, the fourth section requires persons to list both their real and personal estate, so far as the real estate is situated in the town where such persons reside. But it is the sixth section which requires persons "to make out, sign and deliver to the assessor, when required, a certified statement of all their personal property," etc., and the section goes on to specify, with great minuteness, and under fourteen different heads, what this list shall contain, it being wholly devoted to personal property. Then follows the section we have quoted, imposing a penalty for "a false list." Now this "false list" clearly refers to the list of personal property which the preceding section has just required to be made out by all persons "when called on for that purpose." And when the same section provides for doubling the assessment of the property of a person refusing to give in a "list," or [*121] giving in a "false list," can the law be reasonably supposed to refer to any other than that personal property whose listing has been required by the preceding section, and from a delinquency in regard to which, has grown the penalty? The law authorizes the assessor, in cases of refusal to list, or of false listing, himself to list the property at double its value, as a penalty for the fraud sought to be practised upon the revenue in regard to that specific property.

Besides it is the assessor himself who is to assess the value of real estate in the first instance. The thirty-ninth section of the act requires him to do this "from actual view, or from the best sources of information that can be obtained." It is the act of the assessor, not of the owner, and in this very case the assessor testifies that he himself fixed the value of the real estate in conjunction with the owner.

There is another very potent reason why real estate should not be doubled in valuation under this penal power. It often happens that real estate is listed in the name of persons who are not the actual owners. This is sometimes the result of inadvertence, lands being entered year after year, by the officers, in the same name, though they may have been repeatedly sold. Sometimes it proceeds from design, for the sake of perfecting a colorable title by the payment of taxes. Now if a person having a tax title, subject to redemption by minor heirs, has the land listed in

his own name, and double taxes can be and are assessed upon it under this statute, the consequence is, that when the infant owners come to redeem, they find themselves subject to a penalty for an offense which they have never committed. They are required to pay double taxes upon their property because another person has attempted to defraud the revenue in regard to certain other property. We are of opinion that the law should receive no construction which would lead to consequences of this character. It is urged, however, that the second section of the revenue law, in giving certain definitions, prescribes among other things that the term "property," whenever used in this act, shall be held to include both real and personal property. When the term is used in a general sense, we should adopt this rule [*122] of construction, as it is to such cases that it is manifestly intended to apply; but in an act of eighty-three sections, where the legislature is sometimes speaking of real, and sometimes of personal property, we must be permitted to determine, from the context, which is the kind of property referred to, without a merely arbitrary application of this rule. To hold that the term "property" *ex vi termini* means both realty and personalty wherever used in the statute, would involve us in hopeless confusion in its construction, and indeed abolish all distinctions between the two kinds of property.

The assessor also transgressed his power in adding the legacies to the valuation of the estate of John Pulsifer deceased. He had already changed the valuation from $2,700 to $27,000. He then examines the will, and finds certain legacies given thereby. He adds the legacies to the amount already assessed. This is merely taxing the same property twice over in the hands of the same person, and is not admissible.

Neither had the assessor the right to double the valuation of the property assessed to the estate of John Pulsifer. The difference between the eighth and ninth sections, in this respect, is very marked. While the latter authorizes the assessor to charge at its true value "any property" that has not been fairly assessed, the eighth section only authorizes *doubling* the true value of the property of persons who have sought to perpetrate a fraud. The language is, "if any person shall give a false or fraudulent list, * * the assessor, as a penalty therefor, shall assess the property of *such person* at double its value." The penalty is to be confined, as it ought to be, to the property "of such person." The fourth section requires persons to list not only their own property, but also that in regard to which they are clothed with a fiduciary character. A guardian is required to list the property of his wards. Suppose he returns a fraudulent list. Under the ninth section, the assessor can correct the list by charging the property

at its true value, but he can not, under the eighth section, impose the penalty of doubling the true value, because the penalty [*123] is confined to the property of persons who have sought to commit a fraud. It would be grossly unjust to impose a penalty on innocent heirs, because the guardian has made a false return, or to burden an estate with a double tax because the executor has been guilty of a like offense. It is no answer to say that the guardian and the executor can be made to refund the penalty to the wards or the distributees. The remedy would be often doubtful and always expensive, and even if it could always be made effective, it would be a violation of all principle, that the effect of a penal law should be made to fall primarily upon the property of innocent parties. We find nothing either in the letter or spirit of this statute requiring us to give it so unjust a construction.

The decree of the court below will be modified in conformity with these principles. The collector will be permitted to collect the tax upon the doubled value of the personal property assessed to the complainant in his individual right, and also the tax upon the $27,000 charged to the estate of John Pulsifer, without doubling it, and without adding the legacies thereto, and also the tax upon the value of the real estate as first assessed, without doubling it. The case is remanded for the purpose of having the decree thus amended.

Decree reversed.

Q. A. WIGHTMAN *alias* CHARLES W. CLAPP *et al.* *v.* JOHN A. HART.

1. ANSWER IN CHANCERY—*if sworn to can only be overcome by two witnesses.* When complainant requires the answer of defendant, under oath, and he so answers, it can only be overcome by the evidence of two witnesses, or by the evidence of one, and circumstances equal in weight to that of another.

2. PROMISSORY NOTES—*assignment prima facie bona fide.* When promissory notes have been assigned, the presumption will be indulged that it [*124] was for value, and *bona fide*. Persons questioning the fairness of the transaction, to defeat the assignment, must prove that it was not for value, or that it was made for fraudulent purposes.

3. INSOLVENCY OF HOLDER—*not evidence of fraud.* Proof that the holder of a note was insolvent at the time the assignment was made does not prove the transfer to have been fraudulent. Nor does the fact that the assignor was the nephew of the assignee prove the transfer fraudulent.

WRIT OF ERROR to the Superior Court of Chicago.

This was a suit in chancery, commenced in the Superior Court of Chicago, in October, 1862, by John Hart, against Q. A. Wightman, *alias* Charles W. Clapp, Albert Clapp, Frederick

Kaehler, Charles Kaehler, Frederick Johnson and Marion Blanchard.

The bill alleges that Charles W. Clapp, under the name of Wightman, and Edward Benton, as partners, became indebted to complainant. That complainant recovered a judgment, by attachment, against them, in the Superior Court of Chicago; but that it was without service of process, and without seizure of any property belonging to them, and consequently no execution could issue.

The bill alleges that Clapp absconded from Chicago in 1862, for the purpose of defrauding his creditors and complainant. That Benton was insolvent, and left Chicago, and joined the army about the same time.

That said C. W. Clapp, on the 16th of December, 1861, under the false name of Wightman, sold to Frederick Johnson, the schooner *Palmetto*, receiving in return ten notes of $200 each, secured by mortgage on said vessel.

That soon after, C. W. Clapp returned to Chicago secretly, and in disguise, and fraudulently, and without consideration, transferred said notes and mortgage to his brother, Albert Clapp, of Massachusetts, which notes are due and unpaid, and that Albert Clapp holds the same in trust for C. W. Clapp.

It further alleges, on information and belief, that Albert Clapp knew that his brother, C. W. Clapp, absconded from Massachusetts, owing large amounts of money, for the purpose of [*125] delaying creditors, and charges that Albert Clapp knew C. W. Clapp assumed, at Chicago, the name of Wightman, for the purposes of fraud. That he knew C. W. Clapp absconded from Chicago December, 16, 1861, owing money, and that said sale of said vessel was in contemplation of such absconding, and to defraud complainant; and knew such indebtedness was contracted under the name of Wightman. That previous to absconding from Chicago, C. W. Clapp, in January, 1862, sold the schooner *Argo* to Frederick Kaehler & Charles Kaehler, receiving therefor four notes of five hundred dollars each, dated January 18, 1862, and two of them secured by mortgage on said *Argo;* which notes were transferred at the same time, and under the same circumstances as the first named, to Albert Clapp, who holds them in trust for his brother, and are due and unpaid.

That, on information and belief, charges a secret agreement between Albert Clapp and his brother to re-assign said notes and mortgages.

Further, that in said attachment suit, garnishee process was served on Frederick Kaehler and Frederick Johnson, who, in answer to interrogatories, admitted the making of said notes and mortgages, and their readiness to pay, and that said notes and

mortgages had been assigned to Albert Clapp, of which assignment they had notice.

That they attached to their answers the affidavit of Albert Clapp, falsely setting forth said assignment was made in good faith and for a valuable consideration, and that he does not hold them in trust for C. W. Clapp.

It alleges, that in consequence of the non-residence of Albert Clapp, a discovery of the true consideration of said assignment could not be had from him.

It alleges that C. W. Clapp has property which complainant is unable to reach, and that complainant is not in collusion with C. W. Clapp.

That Marvin Blanchard is the attorney for Albert Clapp and C. W. Clapp, and holds said notes and mortgages, and is [*126] informed and advised of all the circumstances of said transfer to Albert Clapp.

It calls for the answers of the defendants, under oath.

It prays that defendants be decreed to pay said Hart said judgment, interest and costs, and the costs of this suit.

That so much of said notes and mortgages as is necessary be subjected to the payment of said judgment.

And prays that defendants be prohibited from paying or collecting said notes and mortgages, or selling, assigning or disposing of the same.

Prays that the assignment of said notes and mortgages, as against complainant, be decreed to be fraudulent and void; for other relief and for an injunction against the defendants.

The defendants answered the bill, and they severally admit, that complainant recovered the judgment in attachment against Wightman and Benton. That Kaehler and Johnson were garnisheed; and that they answered, admitting the execution of the mortgage; but denying any indebtedness to the defendants in that suit, or any property of defendant's in their hands. That Charles W. Clapp did business in Chicago, as charged. That he sold the vessels, and took notes and mortgages, as charged in the bill. And the answers of Albert Clapp and Blanchard set up that the notes were assigned to Albert Clapp, in payment of indebtedness by Charles to him of $3,500, owing before Charles left Massachusetts. That Charles' true name was Clapp, and not Wightman. They deny that Charles absconded from Massachusetts; and deny that he has any interest in the notes. That Albert Clapp only took the notes to obtain his pay. That only six of Johnson's notes and only two of Kaehler's were due when the judgment, in attachment, was recovered. They deny all fraud.

Johnson and *Kaehler* say they are uninformed whether Charles Clapp absconded from Massachusetts on account of his indebted-

ness. That they purchased the vessels in good faith, and know of no fraud in the transaction; and say they are ready [*127] to pay the notes.

Charles W. Clapp: Admits in his answer that he left Massachusetts, and did business in Chicago in the name of Wightman, and in partnership with Benton. He denies that he absconded from Massachusetts, or was insolvent, or that the sale of the vessel was fraudulent or made to delay creditors; or that Albert holds the notes in trust for him; or that he is a brother of Albert Clapp; and says that he was owing Albert when he left Massachusetts for money loaned him, and on account, the sum of $3,000, as alleged by Albert in his answer.

Replications were filed to the answers of defendants.

Luther Clapp says: That he knew but little of Charles for thirteen years previous to that time; that he had no dealings with him, and knew nothing of the circumstances attending his leaving Massachusetts, but thought it was sudden; that he left one debt unpaid. He says he knows of no property of Albert Clapp.

Peter Ham testified: That he knew Charles, and that he, the day before he left, promised to pay or secure witness the next day; that he went to see him, but found he had left, and had no property there; that he owed witness $170, which was due; and he looked for property, but found none; witness knew him by the name of Wightman.

Philip Scandlen says: He was mate of the *Argo*, in employ of Wightman, and afterwards captain of the *Palmetto*. I settled with him and took his note, and released the vessel; he promised to pay, but never did.

Peter Abraham says: I was a master of a vessel, and employed by Wightman; he gave me a deed to secure me for my services, and I discharged the vessel; he gave a note which was never paid.

C. B. Southard testified: Knew a man by the name of Wightman; saw him in Boston, also in Chicago.

Mary Nagley: Testified to Wightman's leaving Chi- [*128] cago, and he directed her that if any one inquired for him to say that he had gone East.

J. Q. Hoyt: Knew him as Wightman; was intimate with him; learned that his name was not Wightman, and spoke to him about it; he said he would explain, but never did.

W E. Johnson: Knew Wightman in Massachusetts; that he met him in Chicago, and called him "Charley;" he said he did not go by that name, and did not want any one to hear witness call him by that name; he told witness that he had difficulty with his wife; that he had left her, and did not intend ever to

live with her again; had failed in business, and owed some debts; that he had purchased the vessels; that they paid for themselves in 1860, and he had made $800 besides. Witness knew Albert Clapp in Boston, and he was in the mercantile business at that place when witness left the East; says he inquired at Salem, but could hear of no property belonging to Charles W. Clapp. This witness states that he was employed to go to Massachusetts to find witnesses as to Charles W. Clapp's being there, and his insolvency, and was paid seventy-five dollars for the service.

H. W. Chamberland says: He saw Benton at Camp Douglas in reference to purchasing a note on him and Wightman, and he advised me not to purchase, as Wightman was to pay it, and I would never get it.

James L. Campbell says: That he holds a note on Benton & Co. for $155; that he called on Benton for payment, when he said that he was worth nothing, and Wightman had taken all the money; had not been able to collect the note.

B. F. Bayden says: That Charles left Massachusetts in 1860, secretly, and in debt; that he absconded, owing witness $250 lent money; the day he left, he sent me a bill of sale from Newton, of his paint mill and stock, with directions to sell it and pay myself, and pay overplus to his wife, also a note. The arrangement was, that I was to attach his property to prevent cred-
[*129] itors from getting it, and save the surplus for his wife. I knew Albert, and he came to me with a letter, requesting me to claim $650. When I read it, I asked what to do, and he said see a lawyer, and follow his advice. I gave the note to his wife. I attached the property before he left.

E. W. Fish says: He knew Charles, and he left Waltham secretly, and thinks he was considered largely in debt. I had three writs to attach property. He settled one on his return. I attached all of his property, so far as I could find it, and sold it.

B. F. Houton says: He knew Charles in Waltham in 1859, but did not know when or how he left, or whether he was insolvent. I cannot say as to Albert's property, but he could or would not pay his bills. He owed me thirty dollars, and paid half of the amount. His reputation is, that he is insolvent. He may own property in Boston, and Salem, and I not know it, and might have loaned money.

E. W. Wisewell says: He knew Charles and Albert Clapp. Charles lived in Waltham in 1859. He was considered solvent up to the time he left. Albert bought an old factory, and cut it in two, and made two dwellings of it. He then worked at pianoforte making. Houghton and Albert had difficulty in settling.

Silas Stone says: He knows Albert, but is not acquainted with his condition as to property. He purchased a building and

converted it into two dwellings, and afterwards traded one of them for a market shop in Boston.

William P. Tenny says: He knew Albert and Charles Clapp. The latter made white lead in 1859 and in 1860, in Waltham. He left in the spring of 1860. Does not know whether he was considered good. I do not know whether he absconded. He owed me $1,000. He promised to consign me white lead, but gave up the business, and did not consign it. When I first knew Albert, he was in Boston, in the provision business, and I suppose he had some means, and never heard of his being insolvent.

Charles Chamberlain says: He lives in Salem, and has [*130] known Albert ten years. He, at one time, owned a house in Salem worth about $1,700. Have heard of his owning property in Boston. I have never heard his credit questioned.

William P. Tenny says: My deposition has been taken at Boston. Albert was, so far as I knew, successful in business. Charles offered me fifty per cent. on my claim. When he left Massachusetts, I did not understand that he owed any one but me, and should think that he then had means to pay his debts.

J. M. Comis says: Charles Clapp boarded with him in Chicago; had no bad habits; and assumed name of Wightman on account of family difficulty, and to prevent his wife from finding him.

P. E. Aldrich says: He knew Charles in Worcester, Mass.

Luther Clapp says: He thinks Albert owned real estate most of the time for the last twenty years. He once owned land in Somerville, and traded it for a house in Boston. He owned a house in Salem, and we did business together. He has always been solvent, and is so at present. He sold his house in Salem for $1,700, and his half of the business for $400. He also owned the half of a team worth $300, and half of the bills. I know he loaned money.

A hearing was had in the court below, on the bill, answer, replications and proofs, and the court decreed:

That the assignment from Q. A. Wightman to Albert Clapp of the ten notes made by Frederick Johnson for two hundred dollars each, dated December 16th, 1861, secured by mortgage on the schooner *Palmetto*, and also two notes made by Frederick Kaehler and Charles Kaehler for $500 each secured by mortgage on the schooner *Argo*, bearing date January 18th, 1862, is fraudulent and void.

That the injunction against said defendants, is made perpetual.

That Frederick P. Kaehler and Charles R. Kaehler, and [*131] Frederick Johnson pay to the clerk of this court, the principal and interest due on said notes up to the day of service of garnishee process on them.

That A. Clapp and M. Blanchard discharge said notes and mortgages and deliver them to the makers, and in default thereof the clerk shall deliver a copy of this decree to the makers which shall be a discharge of said notes, etc.

That the clerk shall pay to complainant on said judgment his *pro rata* portion of said moneys.

That complainant recover of C. W. Clapp and Albert Clapp his costs.

To reverse that decree, defendants bring the cause to this court by writ of error, and assign a number of errors:

1. The court erred in not dissolving the injunction on the motion of plaintiffs in error.

2. The court erred in rendering a final decree on the motion to dissolve the injunction before the cause was ready for hearing; without an order setting the cause down for hearing; or closing proofs, and without notice to the plaintiffs in error, or either of them, or their attorneys.

3. The court erred in making said injunction perpetual.

4. The court erred in perpetually enjoining the payment of $4,000 and interest due from Johnson and Kaehler to Albert Clapp, and directing the sum of $3,000 to be paid to satisfy a claim of $1,523.

5. The court erred in decreeing the transfer of $3000 of said notes and mortgages to Albert Clapp fraudulent and void.

6. The court erred in decreeing the payment to John A. Hart of notes made by garnishees which were not due at the time judgment was rendered in said atttachment suit.

7. The court erred in perpetually enjoining the payment of said ten notes made by Johnson, and said four notes made
[*132) *by F. and C. Kaehler, amounting to $4000 and interest, and admitted to be due and owing by them, and held and owned by Albert Clapp, without making any disposition of the same.

8. The court erred in not dissolving the injunction on the bill, answers and proofs, because the charges of fraud and secret trust are disproved.

9. Because the equity of the bill was fully denied, and those denials in the several answers fully sustained by the proof.

10. Because the complainant had a complete remedy at law.

11. Because the judgment in favor of John A. Hart was not evidence of a debt, and was not a foundation for a bill in equity.

Messrs. GARRISON & BLANCHARD for the plaintiffs in error.

1. There is no prayer in the bill, nor facts in the case, authorizing or justifying a perpetual injunction, on the collection and payment of so great a sum as $4000; nor the appropriation of

$3000, to satisfy a judgment of $1523, even if the same were a sufficient foundation for the bill.

2. Judgment cannot be rendered against a garnishee, as the maker of a promissory note, until the same is due, (Scates' Comp., 232,) nor until after judgment is had against the defendant in the attachment, (sec. 15, p. 231 Scates' Com.) A large portion of said notes were not due when the bill was filed, and judgment in favor of Hart was rendered, and some of them were not due when the decree was rendered.

3. The decree, properly construed, deprives A. Clapp of the proceeds of said notes, and leaves such proceeds in the hands of garnishees, who admit they owe and are ready to pay the same to A. Clapp.

4. The decree, properly construed, leaves almost the entire fund in controversy, in the hands of garnishees, who make no claim to the same.

5. The defendant in error had a complete remedy at [*133] law, and therefore has no right to come into a court of equity for relief. 3 Story's Equity, 996, 896; 3 Daniels' Ch. Pld. & Pr., 1840, 1841; *Abrams* v. *Camp*, 3 Scam., 291; *Born* v. *Staaden*, 24 Ill., 320; *Elston* v. *Blanchard*, 2 Scam., 420, 422; *Owens* v. *Ranstead*, 22 Ill., 161; *Albro* v. *Dayton*, 28 Ill., 329; *Stone* v. *Manning*, 2 Scam., 534; *Norton* v. *Woods*, 22 Wend, 522; *Duncan* v. *Lyon*, 3 Johns. Ch. R., 356; 2 Johns. Ch. R., 144, 296.

6. The judgment against W. & B., for want of personal service or seizure of property, is not evidence of a debt, and is not sufficient to authorize the bill. A creditor must establish his claim at law, before he can resort to equity. *Martyn* v. *Dryden*, 1 Gilm., 212; *Manchester* v. *McGee*, 4 Gilm., 520; *Greenway et al.* v. *Thomas*, 14 Ill., 271; *Buckmaster* v. *Carlin*, 3 Scam., 107, 383; *Elliott* v. *Piersol*, 1 Peters, 340; *Thompson* v. *Tolmie*, 2 Peters, 163, 169; *Voories* v. *U. S. Bank*, 10 Peters, 474; Story's Eq. Pl., 896, 898, 1897; *Hinman* v. *Ruchmore*, 27 Ill., 509.

Messrs. BATES & TOWSLEE for defendant in error.

1. The merits of the entire controversy were settled in the question of making the injunction perpetual; ordering the money into court, and the distribution, and the pleadings and proofs taken, all constituted the basis of such a decree. The prayer of this bill was for an injunction; that was granted. Defendants sought to dissolve it; complainants to perpetuate it, and the decree of the court was in accordance with the prayer of the bill, that it should be made perpetual; that the garnishee should be enjoined from paying the money to the fraudulent assignee.

2. Although the notes of the garnishees were not due, when

the bill was filed, yet the rights of the complainants or the decree of the court, on hearing the motion to dissolve, could in no manner whatever be affected by that circumstance. The pur-
[*134] pose of the bill was to set aside a fraudulent assignment of the notes and chattel mortgages made by the garnishees to restrain their payment until the court should order them paid; and then to have payments made as the court should direct.

3. The order of the court making the injunction perpetual, was not erroneous, but was fully sustained by the facts developed in the evidence, and on the settled principles of equity and the practice of the courts thereof.

4. The evidence of the facts, showing the most outrageous frauds in the contracting of the debt due to complainants, by the defendant, Clapp, under the *alias* of Wightman; that the pretended debt due from him to his kinsman, for which he assigned this large amount of notes, and the chattel mortgages taken on the vessels, all establish to a demonstration that the whole transaction of Q. A. Wightman, *alias* C. W. Clapp, by which the debts due to complainants were contracted; his sale of his property, absconding from the State, and the pretended assignment of the notes and chattel mortgages, were all acts of the grossest fraud and downright villainy, carried on by the principal defendant, under an *alias* for a series of years; and culminating by his absconding from the State. On the principles of the case already cited, and the facts as adduced by the evidence, we claim that the decree was in accordance with the law and the evidence. The evidence is conclusive, that Albert Clapp was not a *bona fide* purchaser of these securities; that he had no means to purchase with; that he was a mere adjunct in the hands of his kinsman, Q. A. Wightman.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

The bill alleges, that defendant in error, in the month of October, 1862, recovered a judgment against Q. A. Wightman and Edward Benton, in an attachment suit in the Superior Court
[*135] of Chicago. But, inasmuch as there was no service on the defendants, or levy on property, no execution could issue upon judgment, against them. Also, that Wightman's real name was Charles W. Clapp, and that he and Benton had been engaged in the commission business in the city of Chicago, as partners, for about two years, before the commencement of the attachment suit. That in January, 1862, C. W. Clapp absconded, to defraud his creditors, and that Benton was insolvent and left the city about the same time. That C. W. Clapp, under the false name of Wightman, sold to one Johnson the schooner

Palmetto, receiving therefor ten notes of $200 each, secured by a mortgage on the vessel.

That soon afterwards, C. W. Clapp returned secretly to Chicago, and fraudulently and without consideration transferred the notes and mortgage to Albert Clapp. That the notes are due and unpaid, and that Albert holds them in trust for Charles. That Albert knew his nephew had absconded from Massachusetts, owing large sums of money, for the purpose of delaying creditors, and that Albert also knew that Charles assumed the name of Wightman for fraudulent purposes. And that he knew that he had absconded from Chicago owing money, and the sale of the vessel was in contemplation of so absconding, to defraud defendant in error.

That he also sold to F. & C. Kaehler the schooner *Argo*, receiving therefor five notes of five hundred dollars each, two of which were secured by mortgage on that vessel, which were transferred, under the same circumstances, to Albert Clapp, who holds them in trust for Charles. And charges a secret agreement that Albert will reassign the notes and mortgages to C. W. Clapp, and that these notes are due and unpaid.

It is further alleged, that in the attachment suit, garnishee process was served on F. Kaehler and Johnson, and that, to their answer, they attached an affidavit of Albert, stating that the assignment was made in good faith, and for a valuable consideration. That Blanchard, as attorney of Albert and C. W. Clapp, holds the notes, and is apprised of all the circumstances of the case. The bill requires answers under oath. Prays that defendants be decreed to pay complainant his judgment, inter- [*136] est and costs, out of the notes; that the assignment be canceled, and that the Clapps be enjoined from collecting the notes.

Albert Clapp answered, admitting the sales of the vessels, the taking of the notes by Charles, and the recovery of the judgment in the attachment suit, as alleged. Also the assignment of the notes to him, but denies that it was fraudulent; and insists that it was done in good faith, and to secure *bona fide* indebtedness, due from Charles to him. Denies all fraud, and all the material allegations of the bill.

The question arises, whether the sworn answer of Albert Clapp has been overcome by the evidence of two witnesses, or that of one, and circumstances equal to the testimony of another. A careful examination of complainant's evidence shows that there is, we think, an entire want of direct or circumstantial evidence to show that the assignment was without consideration, or was fraudulent. Nor does it show that Albert Clapp was insolvent, or of such limited means that Charles could not have been indebted to him. On the contrary, some of complainants' witnesses speak of his having some property, and most of them say he was

engaged in business on his own account, or for others, and none of them seem to know anything definitely of his means. On the other hand, his testimony shows that he had means. Some of his witnesses say he was successful in business, and that they never heard his solvency questioned. It also appears that he owned a house in Boston, and another in Salem, and loaned money. The assignment of the notes is *prima facie* evidence that a consideration was paid, and the complainants' evidence, we think, fails to overcome it, and the sworn answer, and defendant's evidence, which seems to support the transaction as fair.

It is true that the evidence shows that Charles W. Clapp left Massachusetts in debt, and without the knowledge of his creditors. That he left Chicago in the same manner, and it [*137] may be reasonably inferred that he was insolvent at both places. But we are at a loss to perceive how this proves the transaction fraudulent, or that Albert Clapp, his uncle, had no claims against him. For ought that appears, the debt to his uncle may have been a portion of the debts that rendered him insolvent. Albert swears that he was indebted to him at the time, and to satisfy which, the assignment was made, and we find no positive evidence that it was not true, and we think the circumstances fail to show that he did not owe him. Nor does the fact, that Albert and Charles were relatives, prove fraud. It may be a circumstance to excite suspicion, but, of itself, is not proof, nor do we think, in connection with other circumstances, that it overcomes the sworn answer responsive to the allegations of the bill. The decree of the court below must, therefore, be reversed and the cause remanded.

Decree reversed.

EDWIN T. HUNT and WILLIAM J. HUNT, impleaded with JAMES S. BEVERIDGE

v.

RICHARD L. DIVINE.

1. PROMISSORY NOTE — *What constitutes — certificate of deposit.* A banking house issued a certificate of the following form: "Banking house of E. T. Hunt & Co., Sycamore, Ill., March 9th, 1861, C. M. Chase, Esq., has deposited in this bank two hundred and eighty dollars and fifty cents in currency, subject to the order of himself, and payable in like funds on return of this certificate, three months after date, E. T. Hunt & Co.," endorsed "C. M. Chase." *Held*, such a certificate was in effect, a mere promissory note and governed by the rules and principles applicable to that class of paper. The makers of the certificate engaged to pay to the order of Chase, the amount specified in it, in three months after its date, and at no particular place nor on demand.

2. BANKING LAW — *what a violation of.* The banking law of the State only prohibits the issue of evidence of indebtedness not payable on demand, by per-

sons who have availed themselves of its provisions to act in a corporate capacity.

3. SAME—*effect of the words "on return of this certificate."* These [*138] words do not change the legal effect of the undertaking, or require the holder to present the note at the banking house of the makers. There being no promise to pay at the banking house, there was, consequently, no obligation on the holder to present it there.

4. SAME—*rule as to promissory notes.* In regard to this kind of paper the rule is, the maker must find his paper and take it up. The demand is by the maker on the holder, which, when made, will be the time to return the certificate.

5. SAME—*when return of certificate is a condition precedent.* There being no place named where this money was to be paid and the certificate returned, the return of the certificate cannot be a condition precedent to a recovery. If it is produced on the trial, ready to be delivered up to the maker, the holder will have performed his obligation. In every promissory note, there is an implied undertaking by the payee or holder to return it to the maker on payment of the money.

6. SAME—Such a certificate is not payable on the performance of a condition precedent but is payable absolutely, three months after its date. The fact that it is payable at a certain time, is for a certain sum and payable to a certain person, gives it its character of a promissory note—it comes up to all the conditions required of such paper.

7. SAME—*as to promissory note payable on demand.* Such a promissory note, as against the maker, can be prosecuted to judgment without averring or proving any demand. So if it is made payable at a particular time and place it is not necessary to aver or prove a demand at the place, in order to a recovery.

APPEAL from the County Court of DeKalb county; the Hon. EDWARD L. MAYO, County Judge, presiding.

This was an action of assumpsit upon a certificate of deposit. The first count is upon the instrument as a *promissory note.* The second, alleges that on the 9th of March, 1861, in consideration C. M. Chase would *deposit* in the *bank* of defendants for three months, $280.50 in currency, defendants, by name of E. T. Hunt & Co., undertook, &c., in and by a certificate of deposit, dated March 9, 1861, to pay to the order of C. M. Chase the said sum of $280.50, in currency, *on return of said certificate* of deposit, three months after the date thereof. The count then alleges assignment to plaintiff. The common counts are added.

A verdict was found for the plaintiff, on which judg- [*139] ment was rendered. To reverse this judgment, the cause is brought here by appeal.

Mr. CHARLES KELLUM, and Messrs. HURD, BOOTH & KREAMER for appellants.

Mr. R. L. DIVINE, *pro se.*

The certificate of deposit on which suit was brought, is a promissory note. *The Bank of Peru* v. *Farnsworth*, 18 Ills., 565; *Laughlin* v. *Marshall*, 19 Ill., 391; *Swift et al.* v. *Whitney et al.*, 20 Ill., 144.

The words "on return of this certificate" are implied in every

promissory note, and in themselves do not change or modify the legal effect of the instrument. Edwards on Bills and Notes, 295; Story on Promissory Notes, section 107; *Rogers* v. *Miller et al.*, 4 Scam., 335; *Rice* v. *Webster et al.*, 18 Ill., 331.

Messrs. HURD, BOOTH & KREAMER, for the appellants, in reply, said they desired to present the single question: "Can the holder of a certificate of a bank or banker maintain suit upon it without return of the certificate or demand made, and recover interest so long as he may choose to hold it?" The certificate is void under section twenty of act of February 15th, 1851, in relation to time certificates of deposit such as this. *Bank of Peru* v. *Farnsworth*, 18, Ill., 563.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was an action of assumpsit in the DeKalb County Court, brought by the appellee against the appellant on the following instrument of writing: Banking house of E. T. Hunt & Co., Sycamore, Illinois, March 9th, 1861, C. M. Chase, Esq., has deposited in this bank, two hundred and eighty dollars and fifty cents in currency, subject to the order of himself, and pay-
[*140] able in like funds on return of this certificate three months after date, E. T. Hunt & Co.; endorsed C. M. Chase.

The first count of the declaration is upon this instrument as a promissory note—the second count alleges that on the 9th of March, 1861, in consideration C. M. Chase, at the special instance and request of defendants, would deposit in the bank of defendants for three months from and after that date, two hundred and eighty dollars and fifty cents in currency, the defendants by the firm name of E. T. Hunt & Co., undertook and did promise Chase in and by a certain instrument in writing named and called a certificate of deposit of that date, to pay to the order of said Chase on the return of the certificate of deposit, three months after the date thereof the sum of two hundred and eighty dollars and fifty cents in currency—that Chase assigned the certificate to the plaintiff, etc.

The third count is the money counts, work and labor, goods sold and delivered, etc.

The plea was non-assumpsit, and a trial by the court, who found a verdict for the plaintiff, and assessed the damages at $332.85, on which a judgment was duly entered up. The case is brought here by appeal.

The first point made is, that no suit can be maintained on this instrument without a previous demand of payment and a return of the certificate; that such return is a condition precedent to any right to recover.

This further point is made by appellants, that the certificate is void under section twenty of the act of February 15th, 1851, known as the general banking law, and reference is made to the case of the *Bank of Peru* v. *Farnsworth*, 18 Ill., 565.

This point will be first considered, for if it is well taken, it will be unnecessary to consider the other.

Section twenty is as follows: No banking association or individual banker, shall issue or put in circulation any bills or notes of such association or banker, unless the same shall be made payable on demand. And every such association or banker shall always keep on hand a sufficient amount of specie to [*141] redeem all such bills or notes as may be presented at the place of payment. Scates' Comp., 115.

The object and purpose of this act are very apparent. They concern exclusively, incorporated bankers or associations, composed of one only or several persons with power to issue notes as a circulating medium, and not a single individual or firm not incorporated under this act; section six provides that any number of persons may associate to establish offices of discount, deposit and circulation, and become incorporated upon the terms and conditions, and subject to the liabilities prescribed in this act. By section seven, such persons are required, under their hands and seals, to make a certificate which shall specify,—1. The name assumed to distinguish such association, and to be used in its dealings. 2. The place where the business is to be carried on, designating the particular city, town or village. 3. The amount of capital stock, and the number of shares into which the same may be divided. 4. The names and residence of the stockholders, etc. 5. The period at which such association shall commence and terminate. This certificate is to be acknowledged and recorded in the office of the recorder of the proper county, and a copy filed in the office of the Secretary of State, on which being done, the corporation is created with the usual powers of banking corporations.

The term, therefore, "individual bankers," as used in section twenty, must have reference to a banking concern composed of one individual only, and incorporated under the provisions of the act.

If these incorporated "individual bankers" or corporations, fail to redeem their circulation, their notes can be protested, and the auditor can proceed to put them in liquidation and wind up their affairs. A receiver is to be appointed to take charge of the assets of every "such banker or association," and collect the debts due. By section twenty-seven, the assets of any such banker or association as shall come into the hands of the receiver, shall be

[*142] applied in payment of the circulating notes. By section twenty-eight, the amount of stock held by any "individual banker," or by any stockholder in such association, shall be held and controlled by the receiver for the payment of any note put into circulation.

Section thirty provides, that each and all the provisions of the act shall apply to, and control, in all respects, any banker who shall conduct business under the provisions of this law, whether the word banker is or is not used in any such provision. Id., 117.

In the case cited, *Bank of Peru* v. *Farnsworth*, it was conceded that the bank was an association incorporated under the law of 1851, portions of which we have cited, hence, the propriety of the decision, the note being within the prohibition of section twenty of that act. The appellants here, are private bankers and not an institution having general banking powers issuing notes for circulation. This point not being tenable, the other question remains to be considered: Can a suit be maintained on this instrument without a previous demand of payment and a return of the certificate? Is such return a condition precedent to the right to recover?

It is contended by appellants, that a banker has a right to prescribe the terms on which he will receive money on deposit, and when they are reasonable, they must be enforced against the depositor, as part of the contract. That it cannot be said, that a condition, on the face of a certificate, whereby it is made payable on its being returned, is unreasonable, or that it imposes any hardship on the holder, and that it would be a hardship on the banker, if he was required, after having issued a negotiable instrument like this, to follow it into the hands of the holder, and take his funds to a distant place, in order to make payment.

To determine the question presented, it must be first ascertained what is the character of the instrument, and as to that, we have only to refer to the case of the *Bank of Peru* v. *Farnsworth*, already cited. The instrument counted on in that suit, was almost identical with the one before us. The court there say, in form, it is a certificate of deposit. But that is not [*143] all. It is also an express promise to pay the amount deposited four months from date. The certificate of deposit is merely a declaration of the consideration of the promise. The promise to pay is no more qualified or legalized by the certificate of deposit, than it would be by any other expression of a sufficient consideration. The substance and effect of the instrument are precisely the same that they would be, had it declared that for value received the bank agreed to pay Farnsworth the amount in currency on the return of the instrument with his indorsement, four months from date. If such was the

legal effect of the instrument, it is simply a promissory note. No particular form of words is necessary to make a promissory note. Any form of expression containing an absolute promise to pay a certain amount at a time certain, constitutes a promissory note.

To the same effect are *Laughlin* v. *Marshall*, 19 Ill., 390, and *Swift et al.* v. *Whitney et al.*, 20 Ib., 144.

This instrument being a promissory note, it must be governed by the rules and principles applicable to that class of paper.

What did the makers of it engage to do? They engaged to pay Chase two hundred and eighty 50-100 dollars three months after the date of the certificate. It is not payable at any particular place nor on demand, but three months after date at no particular place. Now do the words "on return of this certificate," change the legal effect of this undertaking, or require the holder to present it at the banking house of the makers? There is no promise to pay at the banking house, consequently, no obligation rested on the holder to present it there. The rule is, in regard to this kind of paper, that the maker is to find his paper and take it up. The demand is by the maker on the holder, which, when made, will be the time to return the certificate. Edwards on bills and promissory notes, 221; *Allen* v. *Rigthmere*, 20 Johns. R., 365, wherein it was held, it was the duty of the debtor to seek the creditor, and pay his debt on the very day it became due.

There being no place named where this money was to be [*144] paid and the certificate returned, the return of the certificate cannot be a condition precedent to a recovery. If it is produced on the trial, ready to be delivered up to the makers, the holder will have performed his obligation. In every promissory note, there is an implied undertaking by the payee or holder, to return it to the maker, on payment of the money. An express undertaking to return it, could have no greater force, nor could it change or modify the legal effect of the instrument. All that the maker can demand, is that he shall be protected against the reappearance of the instrument, and against another recovery upon it. This is effectually accomplished by producing the instrument on the trial for cancellation if need be, at any rate, placing it in the power of the maker. Edwards on bills and promissory notes, 295; Story on promissory notes, sec. 107. The return of the certificate, was not, therefore, a condition precedent to the recovery. A condition precedent, is in some sense, a contingency, and an instrument payable on a contingency is not a promissory note, but this is a promissory note as decided in the *Bank of Peru* v. *Farnsworth*, 18 Ill., and *Laughlin* v. *Marshall*, 19 ib. Consequently it is not payable on the performance of a condition precedent, but payable absolutely three months after its date. The fact, that it is payable at a certain time, is for a certain sum, and

payable to a certain person gives it its character as a promissory note—it comes up to all the conditions required of such paper. A promissory note payable on demand, as against the maker, can be prosecuted to judgment without averring or proving any demand. So if it is made payable at a particular time and place, it is not necessary to aver or prove a demand at the place in order to a recovery. *Butterfield* v. *Kinzie*, 1 Scam., 445; *Armstrong* v. *Caldwell*, Ib., 546. In *Wallace* v. *McConell*, 13 Peters, 136, it was likewise held, that in actions on a promissory note against the maker, when the note is made payable at a specified time and place, it is not necessary to aver in the declaration and [*145] prove on the trial, that a demand was made in order to maintain the action. But if the maker was at the place at the time specified, and was ready and offered to pay the money, it was matter of defense to be pleaded and proved on his part. And this is the doctrine of all the courts of this country.

Holding as we do, that this instrument is a promissory note, it must be governed by the rules applicable to that kind of paper some of which we have expressed.

The proposition with which the appellants set out, is attempted to be maintained by the case of *Downs* v. *The Phœnix Bank of Charlestown*, 6 Hill, 297, and which is considered by appellants as like this case, and ought to determine it. We see no similarity in the two cases. The case in Hill was, where a bank had received money on deposit in the ordinary way, from one of its customers, and it was held the depositor could not maintain an action for it, without a previous demand either by check or otherwise. In this case before us, the bank had executed and delivered its promissory note, and made it negotiable, to pay the money specified in it, in a certain time, making it an entirely different case.

The appellee was entitled also to recover on the special counts, and on the authority of *Swift et al.* v. *Whitney et al.*, 20 Ill., 144, this instrument of writing was admissible under them without proof of its execution unless specially objected to. The record does not show any specific ground of objection to this instrument as evidence. The objection if specific, might have been removed on the trial by proof, and therefore should have been then made. *Buntain* v. *Bailey*, 27 ib., 409.

The other case cited by appellants, that of *Wallace* v. *The State Bank*, 2 Eng. (Arkansas) Rep., 61, does not seem to sustain the view they take. In that case there was a demurrer to the declaration, and one of the grounds of demurrer was that it contained no averment that a demand was made by the plaintiff of Fayetteville branch, to return the notes mentioned in the certificate of deposit, and that there was a refusal to do so on the part of the branch.

The Circuit Court sustained the demurrer, and on error [*146] brought, the Supreme Court reversed the judgment.

The inference is the Supreme Court denied it unnecessary to aver a demand and refusal.

The case in 10 Missouri, 519, *Bank of Missouri* v. *Benoist & Hackney*, decides that a demand is not necessary to entitle a party to recover money deposited in a bank after the bank had rendered an account claiming the money as her own, though a demand was necessary to entitle the depositor to recover 10 per cent. per annum from the bank for failing to pay the deposit.

The case in 22 Pickering, 181, was upon this agreement: "Dr. Franklin Bank in account with B. F. White, Cr., 1837, February 10th, to cash deposited, $2,000. The above deposit to remain until the 10th day of August, E. F. Bunnell, cashier. The court held this agreement illegal and void under the statute of Massachusetts, it being a contract by the bank for the payment of money at a future day certain. and that no action could be maintained by the depositor against the bank upon such express contract; but that he might recover back the money in action commenced before the expiration of the time for which it was to remain on deposit, the parties not being *in pari delicto*, and the action being in disaffirmance of the illegal contract; and that such action might be maintained without a previous demand. These cases seem to support the position of appellee, rather than that of the appellants. But the essence of the controversy is, what was the character of this instrument of writing? It being considered a promissory note, the solution of the questions made is not difficult. The judgment must be affirmed.

Judgment affirmed.

GODFREY GORDON *et al.* [*147]

v.

J. J. BANKARD *et al.*

1. PLEADING—*proof.* In a suit against three persons as partners doing business under the name of J. J. B., one of them pleaded in abatement, that they were not partners, but did not aver in the plea that they were not partners under the name of J. J. B. *Held*, if a demurrer had been interposed, the plea would have been pronounced bad because argumentative, but the plaintiff having taken issue, it was proper for the court to instruct the jury that they must find for the defendants, unless they believed, from the evidence, that, at the time the contract was executed, the defendants were partners under the name of J. J. B.

2. EVIDENCE—*admissions.* A partnership may be proven by evidence that each of the alleged partners had admitted its existence, but the admissions of one defendant, made in the absence of the others, are not evidence against them of the existence of the partnership.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

This was an action of assumpsit brought by the plaintiffs in error against the defendants in error at the July term, 1863. Verdict and judgment were for the defendants, and the plaintiffs sued out a writ of error. The facts appear in the opinion.

Messrs. BATES & TOUSLEE for plaintiffs in error.

Messrs. WALKER & DEXTER for defendants in error.

MR. JUSTICE LAWRENCE delivered the opinion of the court:

The plaintiffs below, who are also plaintiffs in error, brought suit against Bankard, Bastable & Fawsett, declaring against them as partners doing business under the name and style of J. J. Bankard, and upon a written contract executed in the name of J. J. Bankard. The defendants pleaded, under the statute, [*148] that they were not partners, but did not aver in their plea that they were not partners under the name and style of J. J. Bankard. On the trial, the court instructed the jury that they must find for the defendants, unless they believed, from the evidence, that the defendants, at the time the contract was executed, were partners under the name and style of J. J. Bankard.

It is insisted by the counsel for the plaintiffs in error that, inasmuch as the plea only put the fact of partnership in issue, and not the partnership under the name of J. J. Bankard, the instruction was erroneous—that, under the pleading, it was only incumbent on the plaintiffs to prove that a partnership existed, and *that* being proven, the other fact, that the partnership did its business under the name of J. J. Bankard was admitted.

The answer to this position is obvious. The plaintiffs sue upon an instrument executed in the name of J. J. Bankard, and they aver in their declaration, that the defendants, as partners under that name, executed the instrument. Unless the partnership existed under that name, the instrument declared on would raise no presumption that it was executed by Bastable and Fawsett, or that they were chargeable upon it. They file a sworn plea, denying that a partnership existed between them and Bankard at the time of the execution of the contract. If no partnership whatever existed, it is clear that none existed under the name of J. J. Bankard. The greater includes the less. The plea then did deny the partnership alleged in the declaration, that is, the partnership under the name of J. J. Bankard, but it did this only argumentatively. That would have been a fatal objection to the plea, had a demurrer been interposed. But it was not, and hence the court, in instructing the jury, had the right to treat the plea as putting in issue the partnership alleged in the declaration,

and to hold the plaintiffs to proof of such partnership. It is true that what is not denied in pleading is considered as admitted, but we can not, under this principle, hold that, where defendants deny that they are partners at all, they do not also [*149] deny, for all purposes of proof, that they are partners under a particular name. As already said, the plea, if not a direct, was an argumentative denial of the partnership laid in the declaration.

The plaintiffs in error also urge, that the 12th instruction given for the defendants was wrong. That instruction is as follows:

"The acts, admissions or declarations of one or more of the defendants is not evidence of the existence of a copartnership between the defendants, so as to bind the other defendants as partners, unless the jury shall find, from the evidence, that such acts, admissions or declarations were made in the presence and hearing of such other defendants, or were subsequently brought home to the knowledge of such other defendants, and assented to by them."

The counsel for plaintiffs in error construe this instruction as meaning, that the partnership could not be proven by evidence that each partner had severally admitted it. If the instruction laid down this principle, it would clearly be erroneous, but we do not thus construe it. We understand it as merely asserting the unquestionable principle, that evidence that one defendant had admitted the existence of a partnership is no proof against the other defendants, not present, of the existence of such partnership.

These are the only points made in the argument of counsel for the plaintiffs in error, and the judgment is, therefore, affirmed.

Judgment affirmed.

DINAH MORRIS *et al.* [*150]

v.

MICHAEL HOGLE *et al.*

1. JURISDICTION—*decree.* In all judicial proceedings, to render a judgment or a decree binding, the court must have jurisdiction of both the subject matter and the person. An order of a county court, rendered on a notice that the executor would apply at the December term of the court for license to sell real estate, to pay debts, and it is not made at that time, but the application is made and the order rendered on a petition filed, without further notice, at the next February term, is not binding on the heirs for want of notice.

2. WANT OF SERVICE—*decree not binding.* If notice of such a proceeding is not served or given to the heirs, in some mode known to the law, a decree licensing the executor to sell lands of the testator to pay debts will be void, and may be questioned in both direct and collateral proceedings.

3. PURCHASER UNDER VOID DECREE—*not protected.* The law will presume that all men inspect public records through which a title is derived, before pur-

chasing, and failing to do so, the law will not relieve them from the consequences of purchasing under a void decree; and purchasers will not be protected in their title when they buy under a void decree.

4. PETITION—*names of parties.* It is no doubt error, to render a decree of sale, on a petition, in a case where the names of the heirs do not appear in the petition, or in any part of the record; but that is not essential to the jurisdiction, and cannot be inquired into in a collateral proceeding.

5, DECREE—*void for want of jurisdiction.* When the court renders a decree without jurisdiction of the person, which is void; it will not be cured, or rendered binding, by a subsequent amendatory decree, rendered without such jurisdiction.

6. DECREE. It is error for the court to license an executor to sell so much real estate as he may deem for the best interest of the estate. He should be licensed to sell as much as may be required to pay the debts of the estate.

7. VOID DECREE. A void decree confers no power on an executor to sell the property of a testator, and his grantee, as well as subsequent purchasers of the property are chargeable with notice, and a court of equity will set such conveyances aside, as a cloud on the owners' title.

WRIT OF ERROR to the Circuit Court of Iroquois county; the Hon. CHARLES R. STARR, Judge, presiding.

[*151] This was a bill in chancery by Dinah Morris, Andrew E. Mandeville and James M. Mandeville, against Michael Hogle, A. C. James, Jacob A. Whiteman, Hann M. Westbrook and David Morford, filed on the 23d of March, 1859, in the Iroquois Circuit Court. The bill alleges that one James M. Smith, of that county, died the owner of four-fifths of the S. W. 35, T. 26, N. R. 10 E., S. W. 36, T. 26, N. R. 10 E., of the third principal meridian. That he made a will; and in the month of August, 1854, the will was probated, and Jacob A. Whiteman, who was appointed executor by the will, received letters testamentary; that he took upon himself the settlement of the estate, and filed inventories, appraisement and sale bills.

The heirship of complainants is set out in the bill, and it alleges that Smith died owning real estate worth $3,102.75; that Smith had, previous to his death, made a mortgage to one George W. Smith for $3,636 upon other real estate; that the executor sold the personal estate for $1,213.94, and had notes and accounts to the amount of $1,601.04; that there were judgments against the estate, in the County Court, for $231.34, and in the Circuit Court for $5,725, up to the time of filing the petition by the executor to subject the lands to sale.

That on the 16th day of February, 1853, the executor filed a petition, and the Probate Court ordered the sale of this property; that at the May term, 1856, the Probate Court made another order, and on the 18th day of February, 1858, the executor, under these orders, sold this property for five hundred dollars, to one A. C. Jones, and executed to him a deed; that Jones afterwards conveyed the lands to one Hann McK. Westbrook for one thousand dollars, and he afterwards conveyed them to David Morford.

The bill charges combination, fraud and intention to cheat, and prays that the orders of the court, and the various sales may be set aside and canceled.

Defendant Morford answered, admitting the allegations of the bill, except that he denies that at the May term of the County Court another order was made for the sale of the [*152] property, but says the court only amended the order of the previous February term; and denies that the first order was made without notice to complainants, or that they were not made parties to the proceeding; and denies that the first order was made in fraud of their rights. He denies that the amended order forbade any person from bidding at the sale; and says the sale was made in good faith.

The answer of Jones denies all, and all manner of fraud, and all of the allegations set forth in the bill against him.

The answer of Whiteman denies all collusion with any person at the sale, charged in the bill, and denies all allegations it contains as to him.

Westbrook admits most of the material allegations in the bill, but denies all fraud and combination, as charged.

The cause afterwards came on to a hearing on the bill, answers, replications, exhibits and proofs, when the court decreed that the deed from the executor to Jones, and his to Westbrook, and his to Morford, be set aside, canceled and held to be void. To reverse which, the cause is brought to this court, and the following errors are assigned:

1. The court erred in not finding a decree in favor of David Morford.
2. The court erred in taking jurisdiction of the complainants' bill.
3. The court erred in overruling the defendant, Morford's, demurrer.
4. The court erred in finding a decree for the complainants to same.
5. The court erred in finding a decree without evidence to support the same.
6. The court should have found in favor of the defendant, David Morford, to the same.
7. The decree is erroneous in other respects and should be reversed.

Mr. JOHN CLARK for plaintiffs in error. [*153]

Messrs. GEORGE B. JOINER & JAMES FLETCHER for defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

The bill in this case was filed for the purpose of canceling a sale and conveyance made by an executor, under a decree of the County Court of Iroquois county, as well as subsequent conveyances of the land. The bill makes the executor, and the persons to whom the subsequent conveyances had been made, parties defendant. On the hearing, the prayer of the bill was granted, and all of the conveyances, in the chain of title from the executor, were set aside and canceled, and the complainants restored to their former rights in the lands.

In this case, the main question is, whether the County Court had jurisdiction of the parties, as well as of the subject matter of the suit. In all judicial proceedings, to render the judgment or decree binding upon parties, the court must be invested with jurisdiction. And if the parties are not before the court, there can be no power to bind them, by decree or otherwise. A defendant must have notice of the pendency of the proceeding, and a reasonable opportunity to be heard in defense of his rights before they can be affected by the decree. The court must, likewise, have jurisdiction of the subject of litigation, or the power to adjudicate and determine the question in dispute will be wanting. If the court lacks such jurisdiction, its proceedings are void, and binding upon no person; but may be questioned in any proceeding, whether direct or collateral.

This bill alleges that the heirs had no notice of the application of the executor to the County Court for a license to sell the real estate of the testator, for the payment of debts. The proceedings on that application were read in evidence on the hearing, from which it appears that the executor gave notice in a [*154] newspaper that he would apply at the December term, 1854, of the County Court for leave to sell the lands of the testator. It also appears that the petition was not filed until the February term, 1855, at which time an order of sale was rendered in accordance with the prayer of the petition. It nowhere appears that any notice was given, by publication, or was served upon the heirs, that an application would be made at the February term; but it was admitted on the hearing that no other notice was given than that the application would be made to the December term. It was likewise proved that no petition was filed at the December term by the executor.

In the case of *Turney* v. *Turney*, 24 Ill., 625, it was held that where an administrator fails to make application at the term to which he has given notice, he cannot, without a new notice, apply and procure an order of sale at a subsequent term. That, failing to file his petition at the term to which he gave notice to the heirs to appear, the suit thereby became abated, and the parties in interest must be again brought into court before any

steps can be taken to affect their rights. If the suit is abated, the parties will not afterwards be in court for any purpose until again served, and the court can not have jurisdiction of the persons of the defendants to render a valid decree. Again, in the case of *Pardon* v. *Dwire*, 23 Ill., 572, it was held that the rendition of a judgment on a service insufficient for the want of the requisite length of time before the return day, and which failed to show that it was served on the defendant, was utterly void. *Schmell* v. *The City of Chicago,* of the present term. These cases are conclusive of the cause under consideration. Here there was no service, or pretense of service, to the term at which the petition was filed and the decree rendered. Whilst the law guards the rights of *bona fide* purchasers at judicial sales with scrupulous care, it will protect owners from being deprived of their property by proceedings unauthorized by law. Executors are not permitted to apply for, nor are courts authorized to decree a sale until the parties in interest have been brought into court, and had the opportunity of being heard in [*155] defense of their rights.

The law presumes that a purchaser inspects the public records, through which title must be derived, before he receives a conveyance. If he did so in this case, he saw that the decree of the court was unwarranted, and that a sale under it could pass no title. If he failed to examine the record, it was his own fault, and he should suffer the consequences of his negligence. For the want of the notice, the decree of the County Court was a nullity, and a purchase under it passed no title.

It is also urged that the County Court failed to acquire jurisdiction, because the names of the heirs and persons in interest did not appear in the petition or notice. Nor do they, in fact, appear anywhere in the entire proceeding. This may be error, for which such an order would be reversed on error, but we are not prepared to hold, that for that reason, the court failed to acquire jurisdiction. In the case of *Stow* v. *Kimball*, 28 Ill., 93, the court inclined to hold, that such an omission did not affect the jurisdiction.

The decree rendered at the February term being inoperative and void, the subsequent decree rendered at the May term, 1856, did not remove any of its imperfections. It, like the former decree, was made without any notice to the heirs, who, never having been in court, could not be bound by it. It was also erroneous to license the executor to sell so much of the lands of the heirs as he might deem for the best interest of the estate. We are aware of no statute or principle of the common law which has invested the executor with such a large discretion, or which authorizes the court to confer it upon him. The testator could have

given him the power, by his will, but he withheld it. The court, under the law, was only authorized to license a sale of so much as was necessary to pay debts, and it was manifest error to go beyond its provisions.

[*156] It was also contended, that the executor was guilty of fraud, in conducting the sale, as well as the purchaser, and his grantees, which requires, that the sale should be set aside, and the conveyances canceled. But, inasmuch as the record is voluminous, and the abstract so imperfectly prepared, as not to present the question, we decline its discussion. All of the purchasers, whether immediate or remote, are chargeable with notice, of the want of jurisdiction, of the County Court to render the decree; as they could not trace title to its source, except through this proceeding. And for the want of jurisdiction, they acquired no title; but as their conveyances operate as a cloud on the title, complainants have a right to have it removed. The decree of the court below is affirmed.

Decree affirmed.

BENJAMIN E. MILES, WELLS ANDREWS, JR., and JOHN A. ANDREWS
v.
ALMON G. DANFORTH.

1. CONSOLIDATION OF ACTIONS. The Circuit Court may in its discretion, consolidate actions between the same parties.

2. SUITS WILL NOT BE CONSOLIDATED WHERE THE PARTIES ARE DIFFERENT. Where the plaintiffs in two suits are different, the court has no authority to consolidate on a motion of the defendants alleging that the suits make only one cause of action.

3. WHERE PARTIES ARE DIFFERENT, IDENTITY OF INTEREST CANNOT BE ESTABLISHED BY AFFIDAVIT. Where the plaintiffs are different persons, the court will not upon a motion to consolidate, allow an allegation of identity of interest to be established by affidavit.

4. REFUSAL TO CONSOLIDATE—*not error unless discretion is abused.* The refusal to consolidate is in all cases discretionary and it cannot be assigned as error unless the discretion has been greatly abused.

5. PRACTICE—*withdrawal of pleadings—error.* The withdrawal of a replication is a matter of discretion and cannot be assigned as error.

[*157] 6. PRACTICE—*overruling demurrer to pleas.* Overruling a demurrer to pleas, establishes the pleas, and if no further answer is made to them, they are a bar to a recovery on the counts to which the pleas were pleaded, and no evidence can be received under those counts. A complete bar is interposed which shuts out all evidence in their support.

WRIT OF ERROR to the Circuit Court of Woodford county; Hon. SAMUEL L. RICHMOND, Judge, presiding.

This was an action of assumpsit originally commenced in the Circuit Court of Tazewell county, by Almon G. Danforth, against Benjamin E. Miles, Wells Andrews, Jr., and John A. Andrews, and by a change of venue, taken to the county of Woodford.

There was a cause pending at the same time in the Tazewell Circuit Court in the names of Asa H. Danforth and George W. Danforth against the same defendants, which actions the defendants alleged were one and the same, and they moved to consolidate them, with the further allegation, supported by their affidavit, if they were not consolidated their defense would be greatly prejudiced. The court refused the motion, and an exception was taken. This motion was renewed in the Woodford Circuit Court, and again denied and exception taken. The defendants had pleaded to the action before this motion was made.

The declaration counted on several promissory notes made by the defendants to A. H. Danforth & Co., and by them assigned to Almon G. Danforth, the plaintiff.

It is unnecessary to state the facts of the indebtedness, inasmuch as the case is made to turn on the pleadings and practice in the Circuit Court.

It is necessary, however, to give the substance of the counts to which the four special pleas of the defendant were pleaded and designated as the sixth, sixteenth, eighteen and nineteenth pleas. The first, second and third counts, described three promissory notes differing in amount, on which issues of fact were made up. The fourth count, was on a note for one thousand dollars, dated November 22d, 1857, payable one day after date, to Asa H. Danforth & Co., with ten per cent. interest from date. The fifth count was upon a note similar in all respects to the [*158] note described in the fourth count. The sixth count was upon a note for two thousand dollars of the same date, between the same parties and payable at the same time. The seventh count was upon a note similar in all respects to the note described in the sixth count.

To each of these counts, the defendants pleaded four special pleas noted as the sixth, sixteenth, eighteenth and nineteenth.

The plaintiff demurred generally to each of these pleas, and the court overruled the demurrer, and he abided by it.

The case was tried on the issues of fact made up, and a verdict and judgment for the plaintiff.

The defendants bring the cause to this court, and assign sundry errors more than thirty in number. Those which this court considered, are the following:

The Circuit Court erred in not consolidating this cause with the case of A. H. Danforth and George W. Danforth, against the defendants below, as moved for in said court, by the plaintiffs in error, whilst said two cases were pending in said court.

The court below erred in permitting the plaintiff below to withdraw his replications to the defendants', 6, 7, 11, 12, and

14th pleas, and in permitting the plaintiff below to file a demurrer to said pleas.

The court below erred in refusing and failing to render judgment for the defendants below, upon overruling the demurrer to the defendants' 6, 7, 16, 17, 18, and 19, pleas, the last four being pleas filed in said court.

The court below erred in refusing to render judgment in favor of the defendants below, in bar of all the notes and counts answered by pleas, the demurrer to which was overruled.

The court below erred in permitting the plaintiff below to give four promissory notes described and set out in the 4, 5, 6, and 7 counts in plaintiffs' declaration to the jury against the ob-
[*159] jection of defendants below, as there was no issue of fact as to those notes proper for the jury to try, and the defendants below should have had judgment on their pleas, to which demurrers had been overruled by the court.

Messrs. HENRY GROVE & DAVID KEYS for plaintiff:

The Court below should have consolidated the cause with the case of A. H. Danforth & Co. against the defendants below. See Chitty on Pleading, 198.

The court below erred in allowing the plaintiff below to withdraw his replications to 6, 7, 11, 12, and 14 pleas, and in permitting plaintiff below to demur to the same. The issues were all joined on these replications. The case had been once tried by a jury on those issues. It may be conceded that the right to withdraw the replication was in the plaintiff, but he had no right to file a demurrer afterwards. 19 Ill., 31, *Brush* v. *Blanchard;* 1 Chitty on Pleadings, 671.

The defendants were entitled to judgment on 6, 16, 18, and 19 pleas. On overruling the demurrer thereto, no replication having been filed, the pleas stood unanswered. *Peal* v. *Wellman*, 3 Gilman, 326; *Weatherford* v. *Willson*, 2 Scam., 253; *McCormick* v. *Tate*, 20 Ill., 334; *Nye* v. *Wright*, 2 Scam., 222; *Bradshaw* v. *Hoblett*, 4 Scam., 53; *Steelman* v. *Watson*, 5 Gilm., 249; *Moore* v. *Little*, 11 Ill., 549.

Mr. H. M. WEED, for the defendant in error:

1. The court below properly refused to consolidate this case with another brought by A. H. Danforth & Co., against the same defendants. This suit is in favor of Almon G. Danforth, and the other suit is brought in the name of Asa H. Danforth and George W. Danforth, who have no interest, legal or equitable, in this case. The motion is founded upon affidavits, which set forth a great variety of facts, but fail to state any substantial reason for consolidating the actions.

It is an impossibility that such a motion should be granted in a court of law, where the parties are different.

In Tidd's Practice, p. 614, it is said: "If two actions [*160] are depending at one time, by the same *plaintiff* against the same *defendant*, for causes which may be joined, and particularly if defendant be holden to trial on both, the courts will compel the plaintiff to consolidate the actions." 2 Durnford & East, 639.

"But the court refused to consolidate two actions brought on two bonds, though they were precisely similar to each other." 1 Chitty Rep., 709.

But a motion to consolidate is addressed to the discretion of the court, and therefore error does not lie. This is well settled in the following cases: *Worthy* v. *Administrators of Chalk*, 10 Richardson's South Carolina Rep., 142; where the question is fully considered. *Planters & Mechanics' Bank* v. *Cohen*, 2 Nott & McCord Rep., 440; 9 Johnson Rep., 262; *Brewster* v. *Stewart*, 3 Wendell Rep., 442; *Farmers' & Mechanics' Bank* v. *Tracy et al.*, 19 Wendell, 23.

2. Complaint is made that the court below allowed the plaintiff to withdraw his replication to certain bad pleas and file a demurrer thereto.

The whole matter of amending or withdrawing pleas, is a matter of discretion vested in the Judge of the court below, from whose decision no appeal or writ of error will lie.

3. If a decision of the court below in overruling the demurrer to the 6, 16, 18, and 19th pleas was wrong, then the objection by plaintiff in error that the notes were improperly admitted in evidence falls to the ground, because the plea amounts to nothing, and there were other issues which made it proper to receive the notes in evidence.

Mr. JUSTICE BREESE delivered the opinion of the court.

The questions presented by this record, are, for the most part questions of practice. Disposing of them will dispose of the case as we understand it.

Two actions in case on promises were pending, one in the name of Almon G. Danforth against the plaintiffs in error, and the other in the name of Asa H. Danforth and [*161] George W. Danforth against the same plaintiffs in error.

The action of A. G. Danforth was upon certain promissory notes made by the plaintiffs in error to A. H. Danforth and G. W. Danforth by the name, style and description of A. H. Danforth & Co., and by them assigned to A. G. Danforth, the defendant in error. The other suit in the name of A. H. Danforth & Co., was brought upon an open account.

This being the position of the cases, the plaintiffs in error entered their motion to consolidate them, alleging that the subject matter involved in the two suits constitute in fact but one cause of action; that the notes, the only cause of action in the suits, were assigned to the defendant in error long after they became due; that the account sued on in the case of A. H. Danforth & Co., accrued while said notes were held and owned by A. H. Danforth & Co., and that plaintiff in error made payments from time to time on both, and by separate trials great injustice would be done plaintiffs in error.

That as against the claims in both suits, they have credits, a set off, and payments amounting more than any just claim of the plaintiff in both suits; that A. H. Danforth and George W. Danforth, the plaintiffs in one case, and Almon G. Danforth, the plaintiff in the other, constituted and compose the firm of A. H. Danforth & Co. The two suits were designed to, and do embarrass the defendants in making their defense, etc. The motion was supported by affidavits not necessary to be particularly noticed.

It will be perceived, these actions were not by the same plaintiff for causes which might be joined. The rule, as stated by Tidd in his Treatise on Practice, is, if two actions are depending at one time, by the same plaintiff, against the same defendant, for causes which may be joined, and particularly if the defendant be holden to bail in both, the court will compel the plaintiff to consolidate the actions; and on account of the vexation, to pay the costs of the application. 1 Tidd's Prac., 614.

[*162] It is not shown by the affidavits filed on this motion, that the parties are really the same in interest, in the two cases, and if not so, with what propriety could the motion be allowed? If the suits were consolidated, a judgment might be rendered against the defendant in error for the indebtedness of A. H. Danforth & Co., for which he was never liable. The legal title to the notes sued on, vests, by the assignment, in A. G. Danforth, and no claim of set off as against A. H. Danforth & Co., could be allowed to prevent a recovery by the assignee. The fact that the notes were assigned after due, does not prejudice the title of the assignee, even if no consideration was paid for the assignment. But by the assignment after due, the plaintiffs in error are not deprived of any defense they may have had, while the notes were in the hands of the original payees. While the title of the assignee is valid, so is the defense of the makers protected.

We are not, however, of opinion that the refusal to consolidate can be assigned as error. We think it is discretionary with the court in all cases, and unless that discretion has been greatly abused, this court will not interfere.

In *Mynot* v. *Bridge et al.*, 2 Strange, 1,178, where two declar-

ations were delivered at the suit of the same plaintiff against the same defendants, one of them for a right of way from one part of a close to one part of a town, and the other was for another way from another part of the close to another part of the town, the court refused to consolidate them, because the plaintiff might be ready as to one and not as to the other; and in the case, two years since of *Smith* v. *Crabb*, ante, 1,149, for the same reason the court refused to consolidate several actions in ejectment.

It is distinctly decided in *Worthy* v. *Chalk*, 10 Richardson's S. C. Rep., 141, that a motion to consolidate, is addressed to the discretion of the court, and should properly be made after declarations filed and before pleading. So in *Thompson* v. *Shepherd*, 9 Johns., 262. So in *Brewster* v. *Stewart*. 3 Wend., 441. This motion was made after pleas filed. These cases, and [*163] others cited, were cases in which the same party was plaintiff in the several actions. We apprehend a case cannot be found, where actions brought by different plaintiffs have been consolidated, or where the fact of identity of interest, has been allowed to be tried by affidavits, especially where the facts stated and relied on in the affidavits as in this case, are put in issue by the pleas.

As to the withdrawal of plaintiff's replications to certain of defendant's pleas, that cannot be assigned as error, for it is also, a matter of discretion. *N. Eng. Fire and Marine Ins. Co.* v. *Wetmore et al.*, 32 Ill., 251.

There is, however, an objection which has not been answered or obviated, which must reverse this judgment.

The first, second, and third counts of the declaration, were on three different notes of different amounts, and issues properly made up thereon. The fourth, counted on a note for one thousand dollars, dated November 22, 1857, payable one day after date, to Asa H. Danforth & Co., with ten per cent. interest from date. The fifth count was upon a note for the same amount and similar in all respects to the note described in the fourth count. The sixth count was upon a note for two thousand dollars bearing the same date, and between the same parties and payable at the same time. The seventh count was upon a note similar in all respects to the last described note.

To these counts the plaintiffs in error pleaded four special pleas noted as the sixth, sixteenth, eighteenth, and nineteenth, to which, severally, a general demurrer was put in by the defendant in error. This demurrer was overruled, the effect of which was to decide that those pleas presented a bar to the action of those counts. Those pleas were no further answered, consequently, they stand as a bar to a recovery on those counts. The defendants in error having abided by their demurrer, no evidence could

be received under those counts. They were as though they [*164] never existed for the purpose of a recovery on them. A complete bar was interposed which shut out all evidence in their support. *Ward* v. *Stout et al.*, 32 Ill., 399.

The tenth and fourteenth errors, are well assigned and the judgment must be reversed and the cause remanded with leave to the defendants in error to withdraw their demurrer to the sixth, sixteenth, eighteenth and nineteenth pleas and reply thereto issuably.

Judgment reversed.

POLLOCK BARBOUR *et al.*
v.
HAMILTON WHITE *et al.*

1. CHATTEL MORTGAGE—*rights of assignee.* The assignee of a chattel mortgage may, upon condition broken, maintain an action of replevin for the recovery of the mortgaged property.

2. SAME. Where a chattel mortgage provided that on the happening of certain contingencies, the notes secured by it, though not due by their terms, should become due and payable, and the mortgagee *may elect* to take possession of the mortgaged property, he is not compelled to take possession in order to preserve his lien, but has the election either to treat the notes as due, or let them stand on their original terms, as he may desire.

3. SAME. When several notes, maturing at different dates, are secured by a chattel mortgage, and the conditions of the mortgage are broken on default in payment of any one of the notes, it is nevertheless optional with the mortgagee to take possession on the first default, or to await the maturity of the last note.

4. SAME. Although the assignee of a mortgage takes it subject to all equities between the original parties, he does not take subject to the latent equities of third persons of which he had no notice.

5. INSTRUCTIONS—*as to reasonable diligence.* When the court instructs a jury that the mortgagee in a chattel mortgage must take possession in a reasonable time, it should also inform the jury what facts, in reference to the case on trial, would constitute reasonable diligence.

[*165] 6. WRIT—*levy.* Where the furniture of a hotel is to be levied on, an officer is to be considered as having made the levy from the time he places a deputy or agent in possession.

7. CHATTEL MORTGAGE—*diligence by mortgagee.* Where notes, payable in the city of New York, are secured by a chattel mortgage on property in Chicago, the agent of the mortgagee in Chicago would have until the next day after being advised of non-payment in due course of mail, to sue out a writ of replevin, provided the advice of non-payment is sent by mail without delay on the part of the person sending. In such cases it is not necessary to resort to the telegraph in order to constitute diligence.

8. PRACTICE. It is error to render final judgment against a part of the defendants, without disposing of the case as to the others.

9. SAME. It is error to enter the default of a defendant after the death of a sole plaintiff, and before his representative had been made a party.

WRIT OF ERROR to the Superior Court of Chicago, Hon. GRANT GOODRICH, Judge, presiding.

This was an action of replevin commenced at the February term, 1859, by Horace White against the plaintiffs in error, to recover certain personal property claimed by him under a chattel mortgage. He died pending the suit and the defendants in error were made parties plaintiff as his executors. They recovered a verdict and judgment and the defendants below sued out a writ of error. The facts, so far as they are material to the points decided, are stated in the opinion of the court.

Messrs. D. C. & I. J. NICHOLS for plaintiff in error.

Mr. E. W. EVANS for defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

In May, 1858, one Beers bought of Maher, one of the appellants, the furniture of a hotel in Chicago, known as the Adams House, paying him therefor $15,000 in liquors, and $5,000 in cash. At the same time he leased the hotel from Maher for a term of ten years, the rent payable monthly at the rate of one thousand dollars per month. The liquors at that time belonging to the firm of A. P. Kenyon & Co., and said [*166] sum of $5,000 was borrowed of one Horace White, now deceased, then a banker in Syracuse, New York, on the credit of one William Walter, one of the members of said firm. Beers, at the time of leasing the hotel, gave his four promissory notes to Walter for $5,000 each, maturing at two, four, six and eight months from date, and to secure their payment, also executed to Walter a mortgage upon the furniture in the hotel. Whether Beers, in this transaction with Maher, was dealing for himself, and had in good faith bought the liquors and borrowed the money, or whether he was really acting merely as the agent of Kenyon & Co., and allowing his name to be used to cover up their property, are questions in regard to which the evidence is contradictory, and as the case is to go before another jury it would be improper in us to express an opinion. Soon after the execution of the notes and mortgage from Beers to Walter, the latter assigned them to Horace White, of whom he had borrowed the money. In September, Beers sold his lease and the furniture to William L. Walter, a son of said William Walter, and gave him possession. The last note to Beers fell due on the 29th of January, 1859, and nothing having been paid on any of them, White, on the 2d of February, sued out a writ of replevin and replevied the furniture. The action was brought against William L. Walter as the tenant in possession, and also against various other persons supposed to claim an interest in the property. On the trial the plaintiff claimed through the mortgage from Beers to Walter, and the defendants Maher and Barbour claimed title

under a mortgage executed on the 24th of August 1858, from Beers to Maher, purporting to be given to secure a note for $10,000, and also whatever rents might be due or accrue upon the hotel, which mortgage was subsequently assigned by Maher to Barbour. Horace White died pending the suit and it was revived and prosecuted in the name of his executors. They recovered a judgment, and the defendants motion for a new trial having been overruled, they bring the case to this court.

[*167] It is urged by the plaintiffs in error, that Horace White, claiming merely as assignee of the mortgage, could not maintain this action, and reference is made to *Olds* v. *Cummings*, 31 Ills., 191. The point of that decision was that the assignee of a mortgage takes it subject to all the equities existing between the original parties. The court say in the opinion, "the assignee of a mortgage has no remedy upon it by law, except it be treated as an absolute conveyance, and the mortgagee convey the premises to the assignee by deeds; and upon the question whether this can be done, the authorities are conflicting." The court is here speaking of mortgages upon real estate. In the case before us the mortgagee not only assigned the notes to White, but also made a formal transfer to him of the mortgage and of the property described in it. This passed the legal title to this personal property as fully as the title to realty would pass by a conveyance under seal, by the mortgage, and as the ordinary remedy on mortgages of personalty is at law, for the purpose of reducing the property to possession and selling it for the debt, we can perceive no reason why the proceeding may not be had in the name of the assignee.

It is further urged by the plaintiffs in error, that the holder of the Walter mortgage lost its priority over that to Maher, by failing to take possession when the first note fell due and remained unpaid. The provision in the mortgage was as follows:

And provided, also, That it shall be lawful for the said Lewis P. Beers, his heirs, executors and administrators to retain possession of the said granted property, and at his own expense to keep, use and enjoy the same until Lewis P. Beers or his heirs, executors, administrators or assigns shall make default in the payment of the said sums of money above specified, either in principal or interest, at the time or times and in the manner hereinbefore contained: *or unless* the said William Walter or his assigns shall fear diminution, removal or waste for want of

[*168] proper care, or if the said party of the first part shall sell or assign, or attempt to sell or assign, said goods and chattels, or any part thereof, or if any writ issued from any court shall be levied on any part of the above described goods and chattels, that then, and in any of the aforesaid cases, all of

said notes, both principal and interest, shall become due and payable; and the said party of the second part, his heirs, executors, administrators and assigns, agents or attorneys, or any of them, may elect thereupon to take possession of the said property, etc.

By this clause it is, in substance, provided that on the happening of any one of certain contingencies, all the notes, though not due by their terms, shall become due and payable, and the mortgagee *may elect* to take possession of the mortgaged property. We are of opinion that the reasonable construction of this provision, when taken in all its parts, is, not that the notes shall become absolutely due, and the mortgagee compelled to take possession, in order to preserve his lien, but that he has the election to treat the notes as due, and take possession, or let them stand upon their original terms, as he may desire. The clause is, so far as the mortgagor is concerned, in the nature of a forfeiture, and to hold that the mortgagee must declare the forfeiture or lose his security, would be an extremely harsh rule for the debtor, and an onerous one for the creditor. For the same rule applies to all the contingencies mentioned in the mortgage, and if the construction claimed by the plaintiffs in error were adopted, it would be necessary for the mortgagee to keep a daily watch upon the property in order to be advised of the occurrence of the contingency. The clause was inserted in the mortgage merely to give the mortgagee additional security, and if he does not deem it necessary to avail himself of his privilege of claiming payment of his notes sooner than they are due by their face, no other person is injured or has a right to complain.

Neither can we hold, as insisted by counsel for plaintiffs in error, that, irrespective of this clause, the mortgagee was bound to take possession as soon as default was made in [*169] the payment of the first note, or of the interest. It was optional with him to do so, or to let the mortgage stand until the last note matured. The contrary rule would greatly impair the value of chattel mortgages as a security, as, if the mortgagee were required to take possession and sell on default in the payment of the first installment, he would lose the benefit of his security for the subsequent installments in all cases where the property was incapable of division, and the mortgage failed to provide that the entire debt should become due on default in the payment of any part. The rights of all parties will be best guarded by requiring of subsequent incumbrancers to act upon the knowledge that the elder mortgagee has the right to delay action until the entire debt secured by the mortgage falls due, provided it falls due within the statutory limitation.

On the trial in the court below, the plaintiffs in error asked certain instructions to the effect, substantially, that if the mort-

gage from Beers to Walter was designed to defraud Maher, it was void as against him, though assigned with the notes, to White before it fell due, and irrespective of the question whether White had notice of the intended fraud. The case of *Olds* v. *Cummings*, 31 Ills., 191 is cited in support of that position. But that case only decides that the assignee of a mortgage takes subject to the equities between the parties thereto, and pointedly discriminates between such case and one where the equities of third persons are sought to be interposed. This point did not come up for decision. We have no hesitation, however, in adopting the rule laid down by Chancellor KENT in *Murray* v. *Silburn*, 2 J. C. R, 441, and for the reason given by him, that "the assignee can always go to the debtor and ascertain what claims he may have against the bond, or other *chose in action*, which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee."

[*170] The same rule is held in *Mott* v. *Clark*, 9 Pa. State Rep., 399, and in *Prior* v. *Wood*, 31 Ib., 147. These instructions were properly refused.

One of the points in controversy on the trial was, whether the plaintiff used sufficient diligence in taking possession of the property after the maturity of the last note, and on that question the court gave for the plaintiff the following instructions:

3. The law requires the plaintiff to take possession of the property in question within a reasonable time after the fourth note matured, and what was a reasonable time depends upon the circumstances of each case, and all the law demands of the plaintiff is that there shall be reasonable exertion, and no unreasonable delay in asserting his rights to the possession of the property after the mortgage became due.

4. "That no general rule can be laid down as to what would be a reasonable time; in general what would be a reasonable time must be determined by the situation of the parties, character, and situation and amount of property, etc.," and that the question of time and reasonable exertion in taking possession is to be decided by the Jury under all the facts in the case.

It is objected that these instructions leave wholly to the jury to determine what is reasonable diligence, without any information as to what the law means by that phrase, as applied to a case like the present. The exception is well taken. Although the instructions declare a correct legal principle, they might easily lead a jury astray. If unaware that the law requires a mortgagee to take immediate possession after forfeiture, the jury might suppose, under these instructions, that a week or ten days would be no unreasonable delay. We might say, since the instructions

are correct, as abstract propositions, if the defendants desired the law to be more specifically laid down, they should have asked an instruction as to what amounted to reasonable [*171] diligence, but it appears when they asked their seventh instruction, to the effect that if Beers remained in possession after maturity of the mortgage, such possession was fraudulent as to Maher, the court qualified the instruction by adding the same general language employed in the plaintiffs' instructions. As the case must, in any event, be reversed on another ground, the court below, at the next trial, should qualify the plaintiffs' third and fourth instructions by explaining to the jury what, in this case, reasonable diligence would be. As the notes were payable at the Metropolitan bank in the city of New York, the plaintiffs' agent in Chicago was under no obligation to sue out the writ of replevin until he could be advised of non-payment in the course of mail, without delay on the part of the person sending the information. We are not disposed to hold that the telegraph must be resorted to in a case of this character, as a means of communication, in order to constitute diligence. The agent would have until the next day after receiving his advices to sue out the writ and replevy the property. Here the furniture of a large hotel had to be scheduled before the officer could remove the property, but he is to be considered as having levied his writ from the time he placed a deputy or agent in possession. These circumstances, if they existed, would establish reasonable diligence, and if there was any longer delay in taking possession it must be shown to have been unavoidable. *Case* v. *Perkins*, 23 Ill., 384.

There are two technical errors in the record which are fatal to the judgment. The defendant William L. Walter was served with process, but no judgment was rendered for or against him. It is error to render final judgment against a part of the defendants, without disposing of the case as to the others. *Dow* v. *Rattle*, 12 Ills., 373.

The other error was in entering the default of the defendant Kenyon after the death of the plaintiff had been suggested on the record and before his executors had been made parties. Kenyon afterwards moved to set the default aside and the motion was overruled. This was error. No valid proceed- [*172] ings can be had in any case after the death of a sole plaintiff, until his representatives have made parties. *Risley* v. *Fellows*, 5 Gilm., 533.

It is urged by the defendants in error that these objections are raised for the first time in this court. We cannot, for that reason, refuse to consider them. They are not proceedings of a character to make an exception necessary in the court below. The

errors appear on the record and can be assigned here. One of them goes in substance to the jurisdiction. It is no more necessary to take an exception to erroneous proceedings of this character than to an erroneous judgment on a demurrer.

Judgment reversed.

ROBERT CAMERON
v.
GEORGE W. SAVAGE *et al.*

1. FRAUD—*evidence of.* The fact, that a man, with his family, resides upon land claimed by his father-in-law; and cultivates, uses and occupies it; paying taxes in his own name, is not evidence that he is the owner; and that the title is kept out of him to defraud his creditors.

2. SAME. The advice of such occupant to the owners to sell a tax title, under which they claim the land, to a third person, is not evidence that it is purchased by such third person on a secret trust for the benefit of the occupant.

And the occupant, having previously contracted for the purchase of the patent title to the land, and forfeited the contract, and that title afterwards having been purchased by the same person who had purchased the tax title, does not prove that such third person holds the title for the benefit of the occupant.

3. SAME. A proposition by the person who had thus purchased the title that if the neighbors of the occupant who complained of his course in the matter would raise and pay him a certain sum of money, that he would convey to the children of the occupant, does not prove that he is fraudulently holding the title to defraud the creditors of the occupant.

[*173] 4. RULE OF COURT—*to produce papers.* A rule of court, that defendant produce the remaining part of a letter, a portion of which he had attached to a commission to take depositions, or show cause, is properly answered and discharged, when, in answer to the rule, the party denies that he has the other part, and states that he believes it to be lost or destroyed.

WRIT OF ERROR to the Circuit Court of Warren county; the Hon. CHARLES B. LAWRENCE, Judge, presiding.

The plaintiff in error, on the 23d day of February, 1863, filed his bill in chancery, in the nature of a creditor's bill, against the defendants in error, in the Warren Circuit Court.

The bill, after setting out the judgment of the complainant against Fletcher, and a return *nulla bona* to the execution issued thereon, and that the same remains unpaid and unsatisfied, proceeds to make general allegations against defendant, averring a fraudulent sale and collusion, together with the following specific allegations:

"And your orator further shows, that said Fletcher, on or about the 1st day of August, A. D. 1859, was, and had been, in possession of the southeast quarter of section one, in township nine, north of range two, west of the fourth principal meridian, in Warren county, Illinois, for more than ten years then past, and had been, and was, the owner thereof, although the legal title thereof was in a certain person by the name of Russell

Parsons, or some other person who was a relative of said Fletcher, and that the title was not in said Fletcher, because said Fletcher intended thereby to defraud his creditors, and that some time about the year 1861, the said Parsons, or his heirs, pretended to convey the said land to said Savage, who was acting in collusion with said Fletcher, for the purpose of defrauding his creditors, and that the same is held in trust by the said Savage, for, and in behalf of said Fletcher, and for his use.

"And your orator further shows, that in the year 1859 or 1860, or about that time, the said Fletcher, for the purpose of defrauding his creditors, transferred to said Savage all of his personal property, consisting of horses, cows, cattle, hogs, wagons [*174] and harness and other property, and that he has secreted the same until he was enabled to sell the same, when he sold the same and used the proceeds thereof in and for his own use, and that said Savage has been continually colluding and conspiring with said Fletcher, in order to defraud your orator, and for that purpose, in addition to said facts, has obtained several judgments in this court and elsewhere to a large amount, which judgments were founded on no consideration whatever, but made and confessed for the purpose of defrauding your orator in the premises."

The oath of defendants to their answers was waived.

At the March term, the defendants filed separate answers, which are the same in statement. The substance of Savage's answer is as follows:

That Fletcher was not in possession of said land ten years, but about seven or eight years. Denies that Fletcher was the owner, but asserts that he was only tenant at will. That the legal title to said land was not in said Russell Parsons, or his heirs; but, on the contrary, Parsons, in his life time, held only a tax title thereto, derived from the auditor's sale of 1833, for the non-payment of taxes, dated in 1835, conveying the land to Parsons. That Parsons had never paid taxes for seven consecutive years after the year 1839. That the wife of said Fletcher was a daughter of said Parsons, and Fletcher was permitted to occupy the land without any lease, contract or grant whatever, as tenant at will; that Fletcher so occupied, so claimed, and had no other claim thereto. That in 1858 and 1859, Fletcher was honestly indebted to him, and is yet between $700 and $800, for money advanced for professional services, interest, etc. That Fletcher became insolvent, etc., and knows of no way complainant's judgment may be satisfied, but he denies that he has any property in his hands or equitable thing whatever, in which Fletcher has any right, and never had.

That some years ago, Russell Parsons died, leaving six [*175] heirs, to whom said tax title and others descended. That

in 1861, he purchased all the interest of said heirs, except the wife of Fletcher, who had before departed this life, leaving several children and some eleven lots of land in the west, held by similar titles, and not regarded by them as valuable, for $300, which he paid with his own money.

Denies that he bought at Fletcher's request for him, and in collusion with him.

Denies that he holds it for Fletcher, but, on the contrary, asserts that Fletcher endeavored by letter and dispatch to prevent said heirs from selling to him. That when he obtained the tax deed to said land, one J. C. Scroggs, of Galesburg, Ill., held the patent title to said land, and was threatening to bring suit for possession thereof, against Fletcher, and he was anxious to get possession himself under his tax deed, so that he could better defend said suit, or make a compromise. That he went to Fletcher and told him that he would be ejected in all probability from said premises by the holder of the patent title, as he had no title under which he could defend, to which Fletcher assented, and therefore proposed and agreed to take a lease and become respondent's tenant, so that respondent could better defend or compromise. That Fletcher then became his tenant, and took a written lease, which he cannot produce, because he has not the control thereof.

After which, he compromised said suit, and purchased the title of Scroggs, being the patent title, which he paid for out of his own money and for his own use, and not at the solicitation of Fletcher. That when Scrogg's deed was made, he expected to sell the land, and at his suggestion, Scroggs made the consideration $600 instead of $200, the actual consideration, which he had done solely to enable him to sell the same to a better advantage, and nearer its true value.

[*176] Denies that in these transactions he acted for the purpose of hindering, delaying or defrauding the creditors of Fletcher, but, on the contrary, asserts the fact to be that instead of acting in collusion with Fletcher, he acted in opposition to him and his wishes. That in the year 1859 or 1860, Fletcher did execute to him a chattel mortgage of all his personal property in said bill described to secure an indebtedness due from Fletcher to respondent, but he never had possession of the same or any part thereof, and never disposed of it, and never secreted the same, but that the same was left with Fletcher, and that complainant or some other creditor had the same sold under execution. That the mortgage was executed to him at Fletcher's request; that Fletcher owed him a large sum of money as already stated, but at the time no settlement had been made between them, and neither knew the precise amount due. That the mortgage was

given to secure $1,200 which they supposed might be about the amount due. Admits that afterwards, on settlement, they found but about $750 due, for which a note was given. That the note was *not* given for money loaned and advanced for hay sold by Fletcher for respondent and for professional services and interest; but as to the amount of each particular, he cannot certainly answer, but believes he advanced about $450 cash for the use and benefit of Fletcher. Hay about $180, and the rest for professional services and interest. That the judgment in the Circuit Court of Warren county was obtained on said note. That no consideration was given Fletcher to induce him to become tenant of respondent. Admits that Fletcher transferred a horse to respondent, (but no other property,) worth $100, and that he credited $125 on his judgment for the horse.

Replication was filed to Fletcher's and Savage's answers.

At the October term, 1863, there was a hearing on the bill, answers, replications, exhibits and proofs, when a decree was rendered, dismissing the bill without prejudice. To reverse that decree, the complainants bring the case to this [*177] court, and assign the following among other errors:

The court erred in entering a decree dismissing the bill.

The court erred in not entering a decree, according to the prayer of the bill, in favor of plaintiff in error, and subjecting the land described in the bill to be sold to satisfy plaintiff's judgments, and also against Savage for the amount of personal property he secreted and sold belonging to Fletcher.

Mr. A. J. KIRKPATRICK for plaintiff in error.

Messrs. GLOVER, COOK & CAMPBELL for defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

It appears from the evidence that Russell Parsons was the owner, by tax title, of the quarter of land in dispute. That Fletcher, his son-in-law, had occupied it for about ten years. Had improved and cultivated it without paying rent. It also appears Savage purchased the interest of all of Parsons' heirs, except Mrs. Fletcher, in this and eleven other quarters held by tax title, and had purchased the patent title to the land in controversy, as alleged in the answer. Nor do we find that there is any direct evidence that Savage held, or professed to hold, for Fletcher. Nor is there any testimony shewing that his money was paid for the land, or that there was any secret understanding that he was to refund it and become the owner of the property. There is also a want of evidence to shew that Fletcher ever paid Parsons for the land, or that any arrangement existed by which he was, in any event, to become the owner. And in the absence

of such proof, it may be supposed that the father-in-law simply permitted him to occupy the land as a means of supporting his family. That he was willing to give him the use of the land but not the title.

[*178] It is true that Fletcher is proved to have called the land his, and to have exercised such acts over it as is usual by an owner. But these declarations are not evidence against Savage. He never seems to have admitted that Fletcher was the owner after he acquired the tax and patent title. And the acts of Fletcher, after that time, were consistent with the relation of landlord and tenant. It is insisted, as evidence of ownership, that Fletcher agreed upon the terms of a lease, but he referred the parties to Savage, who said Fletcher had no right to lease the property. It is true that Fletcher said at the time, that if he leased the property complainant would get the rent, but we find no evidence connecting Savage, in any way, with this declaration, and unless there was, he cannot be bound by the declarations of a third person. There may be an abundance of evidence to warrant a decree against Fletcher if he had any title, but that does not warrant a decree against Savage.

It is, however, said that Savage proposed, when his neighbors complained of his course in the matter, that if they would make up a certain sum of money, (the witness was not able to state whether it was three or five hundred dollars,) he would deed the property to Fletcher's children. We do not perceive that this proves any interest whatever in Fletcher. Again, it is said that Savage admitted that he intended to convey half of the land to Fletcher's children. Suppose he did, does that, of itself, prove that Fletcher had any legal or equitable interest in the land? We think not. He at that, or no other time, seems to have admitted that he was under any legal or equitable obligation to convey. But if he was under such an obligation to them, it does not follow that he would be to the father, and the complainant can only be subrogated to the rights of his debtor.

Nor do we see that the evidence establishes any collusion in declaring Fletcher's contract with Scroggs forfeited, and in the sale by him to Savage. Scroggs had used all reasonable efforts to make the money out of Fletcher, but seems to have failed.

[*179] It is not denied that Scroggs had the right to declare the forfeiture, and we cannot infer that it was collusion simply because Fletcher was in Galesburg on the day Savage purchased the patent title. Scroggs testified that he was informed that Fletcher was in the city on that day to protest against the sale, but did not see him. Had it been a part of a plan, to cover up collusion, that Fletcher should be there to object to the sale to Savage, we may suppose that he would have carried out the plan,

by seeing Scroggs, and protesting against the sale. It is true that Scroggs says he had the impression that Savage was purchasing for Fletcher, but can state nothing that was said by Savage to produce such an impression. Loose and indefinite impressions of witnesses are too weak and uncertain upon which to transfer the title of property from one person to another. To authorize such a decree, there must be evidence, and not mere impressions of witnesses, without facts to sustain them.

It is insisted that, as Fletcher signed a letter to Parsons' heirs, advising the sale of the lands to Savage, it must, therefore, have been for Fletcher's benefit. We cannot see any proof of the supposition from this fact. The treaty was for tax titles to twelve quarter sections of land, owned by the heirs of Parsons; and when the judicial history of this class of titles is considered, it is not strange that a person residing in Illinois should advise a friend living in a distant State to dispose of them at a price small in comparison with the value of the lands. But, be that as it may, Fletcher afterwards, for some reason, telegraphed to the heirs not to sell.

It is also supposed, that the fact that Fletcher paid the taxes on the land in controversy, is evidence of his ownership. Admit that he did pay them in his own name, that only proves, that as he was occupying the land, free from rent, he felt it to be his duty to relieve his father-in-law from the burthen, and as some compensation for its use; or it might have been to prevent some other person from acquiring a tax title, and to avoid expense in defending his possession. And it seems, that when [*180] he failed to pay, the county clerk suggested to Savage that he should purchase the land at the tax sale.

It is likewise urged that the judgment, held by Savage against Fletcher, was fraudulent, and only obtained and kept on foot for fraudulent purposes, and to prevent Fletcher's creditors from collecting their debts.

The production of a judgment between the parties is *prima facie* evidence as to third persons, of such indebtedness, and there seems to be no evidence to overcome its effect. There was evidence that Savage had attended to business for Fletcher, as his attorney, and none to rebut it. Complainant alleged that all of these transactions were fraudulent. And it devolved upon him to prove the allegations of his bill. To that end he called for the answers, but they afforded no evidence, but left him to make the proof by other means, and we think he has failed in his effort.

It is again urged, that the court erred in not compelling Savage to produce the remainder of the letter, a part of which he made an exhibit in the commission to take Marcus Parsons' deposition. It seems he produced another part of a letter, and stated

in an affidavit in answer to a rule to produce it, that he had made diligent search and was unable to find the paper, and believed it was lost. We think, from an examination of the affidavit, he sufficiently answered the rule, and that the court committed no error in discharging it. After a careful examination of this entire record, we are unable to perceive any error, for which the decree of the court below should be reversed. It is, therefore, affirmed.

Decree affirmed.

Mr. JUSTICE LAWRENCE having tried the cause in the court below, took no part in this decision.

[*181] KATE C. A. A. COWL and W. AUGUSTUS COWL
v.
MARK VARNU.

1. CHANCERY—*lien of vendor of land rests on intention.* The lien of a vendor of land, is the offspring of courts of equity alone, independent of any express contract, upon the mere supposition of the intention of the parties. Whenever, therefore, the court can infer from any circumstances, that the vendor did not rely upon this lien for this security, it is treated as waived.

2. SAME—*how it may be waived.* Taking the note of a third party for the purchase price is deemed a waiver of this lien.

3. SAME—*not to be extended beyond settled principles of equity.* These liens are secret, and often productive of much injustice, and should not be extended beyond the requirements of the settled principles of equity.

4. SAME—*lien waived how, where wife is purchaser.* Where a married woman purchased a tract of land paying five hundred dollars of the purchase money with her own funds, not derived from her husband, and the husband gave his note for the balance of the purchase money, the vendor has no lien on the land for such balance.

WRIT OF ERROR to the Circuit Court of Henry county; the Hon. I. O. WILKINSON, Judge, presiding.

This was a bill in chancery in the Henry Circuit Court by Hiram Varnum against Kate C. A. A. Cowl and W. Augustus Cowl, her husband, to enforce a vendor's lien. A decree passed in favor of the complainant, and the case is brought here by writ of error. The only error assigned, is the decree upon the facts, which are fully stated in the opinion of the court.

Mr. C. C. WILSON & Mr. MARTIN SHALLENBERGER argued for the plaintiffs in error, and submitted these points:

By the act of February 12th, 1861, statutes of Illinois, the property of a married woman, both personal and real, shall be and remain her sole and separate property, and shall not [*182] be subject to the disposal, control or interference of her husband, and shall be exempt from execution for the debts of her husband, etc.

Therefore, when the deed of said real estate was delivered to

said Kate C. A. A. Cowl, the said real estate became her property, vesting in her, full, complete and absolute title.

The complainant had the right in the first instance to insist on the payment of the whole sum of the purchase money, but by his act of delivering the deed and possession of the said real estate to Kate C. A. A. Cowl, and receiving the individual note of her husband for the remaining three hundred dollars of the purchase money, he thereby lost all right or title to said real estate, and it became the absolute property of said Kate, and a court of equity cannot compel her to part with her title to said real estate without her consent, citing, *Spurk* v. *Crook et al.*, 19 Ill., 415; *Moulton et al.* v. *Hurd*, 20 Ill., 137; *Lane* v. *Soulard*, 15 Ill., 123.

When a married woman has even an equitable interest, the courts cannot take it from her without her consent, and it is admitted in the bill, that the five hundred dollars paid was her sole separate property; therefore she has at least an equitable interest in the said real estate, citing, *Spurk et al.* v. *Crook, et al.*, 19 Ill., 415; *Knowls* v. *McCramby et al.*, 10 Paige R., 342; *Martin* v. *Williams et al.*, 10 Ohio R., 303; *Percell* v. *Garhare et al.*, 17 Ohio R., 105.

The second error assigned is, "that the court erred in ordering that complainant have a lien as vendor of said real estate for the payment of the note of W. Augustus Cowl, one of the defendants."

They said the vendor's lien arose from principles of equity alone, and had no foundation or support in the principles of the common law or our statute. Courts of equity have created this lien independent of any express contract, upon the mere supposition of the intention of the parties, and whenever, from any circumstance, the court can infer that the vendor did not rely upon this lien for his security, the courts have treated it as waived. Thus the taking of any security either personal [*183] or material, has been considered as a waiver of the lien, citing, *Conover* v. *Warren*, 1 Gilm., 498; *Trustees* v. *Wright*, 11 Ill., 603; *Richards* v. *Leaming et al.*, 27 Ill., 431.

They insisted if a vendor takes a distinct and independent security for the purchase money, his lien on the estate is gone; such a security being evidence that he did not trust to the estate as a pledge for his money, citing, 2 Sugden on Vendors, 65; 4 Kent's Com., 153; 2 Story's Eq. Jur., 467, 477, 478 and Notes.

The lien is also discharged by taking a pledge of goods, a mortgage on real or personal estate, or the responsibility of a third person, citing, 4 Kent's Com., 153; 2 Story's Eq. Jur., 475, Note 2, 2 Sugden on Vendors, 59; *Brown* v. *Gilman*, 4 Wheaton, 255; *Fish* v. *Howland*, 1 Paige, 20; *Williams* v. *Roberts*, 5 Ohio, 18.

On the principle of these authorities, it was very clear that the complainant was not entitled to the relief he claims by his bill. It was evident by the facts disclosed in the bill and answer, there being no other proof, that he waived his lien by receiving and relying on the individual note of W. Augustus Cowl, who, by the act of February 12th, 1861, is a separate and distinct person so far as business matters and the control of the property of Kate Cowl his wife is concerned; and the taking of his note was the same in law as the taking of the note of any other third person.

They said it would seem by the bill, that at the time of the sale of the real estate and the conveyance thereof, neither party had in contemplation the lien now attempted to be enforced, as the complainant alleges in it that W. Augustus Cowl is poor and has no property out of which to enforce collection of the note; therefore it must be clear he thought of the lien after he satisfied himself that Cowl had no property; for if he had have known that fact, before he delivered the deed and received the note, he most certainly would not have delivered the same; and the fact of that note being worthless, will not alter the matter, as he relied
[*184] upon it at the time and not upon the land, citing, *Conover* v. *Warren*, 1 Gilm., 498.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was a suit in chancery to enforce a vendor's lien, on the following state of facts: The defendant in error sold certain real estate to Kate C. A. A. Cowl, one of the plaintiffs in error, for eight hundred dollars, she being at the time of the purchase, the wife of her co-plaintiff in error, W. Augustus Cowl, who then acted as her agent in the purchase of the property. Kate paid to the complainant, by her agent, five hundred dollars of the purchase money, it being her sole and separate property, and complainant accepted, for the balance due, the note of W. Augustus Cowl, for three hundred dollars.

On these facts, had the complainant a lien on the land for this balance of the purchase money?

When the deed of the land was made and delivered to Kate Cowl, the land became her property, the title to which was vested in her, absolutely.

The act of February 12th, 1861, provides, that all the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married, owns at the time of her marriage, or which any married woman acquires, during coverture, in good faith, from any person other than her husband, by descent, devise or otherwise, together with all the rents, etc., shall, notwithstanding her marriage, be

and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried ; and shall not be subject to the disposal, control, or interference, of her husband, and shall be exempt from execution or attachment for the debts of her husband. (Sess. laws 1861, page 143.)

By the delivery of the deed, and possession of the land, to Kate Cowl, and receiving her husband's note for the balance of the purchase money, the appellee passed away to [*185] her, his title to the land, and it became the wife's absolute property, as much so, as if it had been devised to her. It did not come to her through her husband, and no court could compel her to surrender her title to it, without her consent. Before this statute this court held in *Spurck and wife* v. *Crook et al.*, 19 Ill., 415, that by the common law, a wife could not be compelled to convey her land, or release her dower, on any contract, she alone, or in conjunction with her husband, may have made. As Anna Spurck, in that case, had an equitable title, we held she could not be compelled, by a decree of court, to part with it, against her consent.

And on the same principle, the case of *Moulson* v. *Hurd*, 20 Ib., 137, was decided. The payment of five hundred dollars of her own money, as part of the purchase price of the land gave her, at least, an equitable title in it, of which the court could not divest her.

On the other question, had the complainant a vendor's lien on this land, we held in the case of *Richards* v. *Leaming et al.*, 27 Ib., 432, that this lien arises from principles of equity alone, and it is created by courts of equity, independent of any express contract, upon the mere supposition of the intention of the parties, and whenever from any circumstance, the court can infer that the vendor did not rely upon the lien for his security, the courts have treated it as waived. Therefore, taking any security, either personal or material, or the neglect to enforce the lien for a considerable time, though short of the time prescribed by the statute of limitations, has been considered as a waiver of the lien. And in *Conover* v. *Warren*, 1 Gilm., 498, this court held, that the lien was discharged by taking any independent security, such as a deposit of stock, a pledge of goods, a mortgage on real or personal estate, or the responsibility of a third person.

Here, the note of the husband was taken, a third person in the sight of the law governing this case. Taking this note, is evidence the vendor did not look to the land, as a security for his money. These liens are secret, unknown to the [*186] world, and often productive of much injustice, and ought not to be extended beyond the requirements of the settled principles

of equity law. *Richards* v. *Leaming et al.*, Supra, 433. These authorities show, conclusively, that no lien existed on this land. Complainant waives his lien by accepting the note of W. Augustus Cowl, who, by the spirit and intention of the act of February, 1861, above quoted, was, to all purposes, so far as the control of this property of his wife is concerned, a separate and distinct person, a third party, as much so, as if he were not her husband.

The decree of the court below allowing the lien is reversed, and the cause remanded with leave to amend the pleadings.

Decree reversed.

ISAAC COOKE
v.
JAMES H. ORNE.

1. PRACTICE—*depositions.* Statements in a deposition which are not legitimate evidence, like hearsay, may be objected to on the trial, but those which are objectionable, merely because secondary evidence, should be objected to before the trial.

2. GUARANTY—*notice of acceptance.* When a letter of credit is addressed either to a particular person, or to the public generally, and credit is given in consequence thereof, the person giving the credit must notify the guarantor within a reasonable time that the guaranty has been accepted. But where A writes to B, who desires to purchase goods from A, that if C will guaranty the payment, he will sell B the goods, and C writes to A in reply that he will guaranty, no further notice of the acceptance of the guaranty is necessary. The bargain is complete when C accepts A's offer, and any further notice of acceptance by A would be superfluous.

3. PRACTICE—*pleading.* Only by a demurrer in the court below, or by a motion in arrest of judgment, can the sufficiency of a declaration be brought before the Supreme Court.

[*187] WRIT OF ERROR to the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

This was an action of assumpsit brought by the defendant in error against the plaintiff in error at the June term, 1858. The plaintiff recovered a verdict and judgment, and the defendant sued out a writ of error. The facts are stated in the opinion of the court.

Mr. W. T. BURGESS for plaintiff in error.

Messrs. MCALLISTER, JEWETT & JACKSON for defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the majority of the court:

In the year 1854, Hulme & White leased from Cooke, the plaintiff in error, a hotel in Chicago, called the Young America, then newly built. Hulme went to Philadelphia to purchase fur-

niture. He there saw one Henkle, a dealer in cabinet furniture, and Orne, the defendant in error, plaintiff below, who was a dealer in carpets. He offered them Cooke as security for his proposed purchases, and at his suggestion, Henkle visited Chicago to ascertain the pecuniary condition of these parties. On his return to Philadelphia, Henkle wrote Hulme & White that himself and Orne would sell the goods on six, twelve and eighteen months, the first note to be merely the paper of the firm, the last two to be endorsed by Cooke. Hulme & White wrote a letter in reply, accepting the proposition, and to this letter Cooke added a postscript, also accepting, and stating that he would endorse the notes as proposed. This postscript was signed by Cooke, and the letter was sent to Henkle. On its receipt, he showed it to Orne, who thereupon purchased the carpets. Henkle was prevented from sending the cabinet furniture, by the destruction of his warehouse and its contents by fire shortly after the arrangement was made. Soon after the carpets were re- [*188] ceived, Hulme & White were requested by Orne to forward the notes according to the arrangement. They at once sent the first note, but Cooke being then in Washington, they wrote Orne they would procure his endorsement upon the other two notes upon his return, and then forward them. When Cooke returned home, they presented the notes for his endorsement, which, in the language of the witness, he evaded, saying there was time enough. Orne again wrote, urging the sending of the notes, with Cooke's endorsement, and Cooke still, when asked to sign, would decline doing so, without, however, denying his agreement, or claiming that he should be discharged from it. Finally Hulme & White, finding they could not procure Cooke's endorsement, sent their own notes, which Orne promptly returned as not being in conformity with the agreement. Neither the second nor third payment upon the carpets having been made, Orne brought suit against Cooke for refusing to endorse the notes, and recovered a verdict and judgment.

The letter of Hulme & White, with the postscript of Cooke, was destroyed in the fire which consumed Henkle's warehouse. No objection is taken to parol proof of the contents of this letter, but it is urged that it was error on the trial to allow parol evidence of the contents of the letter from Henkle to Hulme & White, and also of the notes presented to Cooke for his endorsement. This evidence was in depositions, and if the defendant below desired to take this objection, he should have done so before going into trial. The objection, if made in season, might have been removed by showing the loss of the letter, or by producing it. Statements in a deposition which are not legitimate evidence, like hearsay, may be objected to on the trial, but those which are

objectionable merely because secondary evidence, should be excepted to before the trial. *Cosgrove* v. *Anderson*, 30 Ill., 95.

The plaintiff in error also insists that the proposition contained in the letter from Henkle to Hulme & White, to which Cooke assented, was a joint proposition by Henkle and Orne, and as Henkle did not send the cabinet furniture, Cooke is not
[189*] bound to Orne for the carpets. Whether this was a joint contract was a question submitted to the jury by the first instruction asked by the defendant and given by the court, and by them decided not to be so. We think this finding right. Henkle and Orne had no connection in business. They simply had a common interest in being paid for what they might respectively sell. Neither was responsible for the default of the other, as neither undertook for the performance of the other. Henkle, in writing upon what terms he would sell the furniture, and Orne the carpets, was merely, as to Orne, the medium of communication—the agent *pro hac vice*. Cooke, when declining to endorse the notes, gave no such reason as that now suggested by the ingenuity of his counsel, as he clearly would have done if he had considered the contract a joint one on the part of Orne and Henkle.

It is also urged by the plaintiff in error that Cooke was entitled to notice that his guaranty had been accepted and would be acted upon, and *Adams* v. *Jones*, 12 Pet., 213, and other cases, are cited in support of this position. These authorities, however, are not in point. Undoubtedly it is the settled law, that where a letter of credit is addressed either to a particular person, or to the public generally, and credit is given in consequence thereof, the person giving the credit must notify the guarantor, within a reasonable time, that the guaranty has been accepted. But here this notice is implied in the very nature of the transaction. Hulme did not go to Philadelphia with a letter from Cooke stating that if Orne would sell Hulme carpets, Cooke would guaranty the payment, and, on the strength of such letter procure the carpets, Cooke being ignorant whether his offer would be accepted or not. On the contrary, the proposition comes from Orne. He says, by the letter of Henkle, if Cooke will guaranty the payment, I will sell. Cooke writes, in the postscript of Hulme & White's letter, that he will guaranty. The moment he wrote that acceptance of Orne's offer, the bargain was complete. He then knew that the goods were to be furnished upon his credit. He knew his
[*190] guaranty was already accepted, and that he would be responsible for the goods, if furnished before the guaranty was withdrawn, and within a reasonable time. Any further notice of the acceptance of the guaranty would have been superfluous.

The plaintiff in error also insists that notice of the amount of

goods sold should have been given to Cooke. The contract, of which Cooke was cognizant, was for the sale of carpeting sufficient for the hotel. No instruction was asked by the defendant below upon this point, and, if it had been, the facts appearing in the record, to wit, the agreement of Cooke to assist Hulme & White in furnishing the house as an inducement to them to lease it, the circumstance that Cooke was just completing the hotel as this purchase was made, the fact that he resided in the same town, and would almost certainly be personally cognizant of a matter so important to the success of his hotel enterprise as the furnishing of the house, all these facts, in connection with the specific agreement to become responsible for the carpets, would have justified the jury in presuming that Cooke had actual notice of the amount of carpeting furnished.

It is also urged that it was the duty of Orne to present the notes to Cooke for endorsement within a reasonable time. The jury were so instructed, and, by their verdict, found this had been done. Hulme testifies that soon after receiving the goods, they were requested by Orne to send their notes, and then Cooke was in Washington. When he returned, they presented the notes, requesting his endorsement, and so far from complaining that they had not been presented sooner, and that he had thereby been damnified, he put off the endorsement, saying "there was time enough." Under the contract, between the parties, no special diligence was necessary in presenting the notes for his endorsement, and, from this evidence, the jury were justified in finding that they were presented within a reasonable time.

As to the objection taken to the declaration in regard to the difference between price and value, it is only necessary to say that, if valid, it should have been presented by de- [*191] murrer. Only by a demurrer in the court below, or a motion in arrest of judgment, can the sufficiency of the declaration be brought before this court. Here there was neither.

Judgment affirmed.

RUSSELL GIBBS
v.
ELIAS BLACKWELL *et al.*

1. BILL FOR SPECIFIC PERFORMANCE—*parties.* In a case of a bill for a specific performance of a contract, as a general rule subject to some exceptions, the parties to the agreement are alone necessary parties.

2. PARTIES—*trust fund.* On a bill filed to enforce the specific performance of a contract, for the conveyance of real estate, it is no defense, to set up that the money paid was a trust fund; or that the purchase was made by one as trustee of another. If a trust exists the vendee, or in case of his death, his heirs will be liable to account to the *cestui qui trust*, and he is not a necessary party to a bill, to compel a conveyance.

3. VENDOR AND VENDEE. When a vendee has paid the purchase money, entered into possession under the contract, and made lasting and valuable improvements, he has a right to compel a conveyance; nor will the vendor be exonerated therefrom, by showing that as between his vendee and some other person there are unadjusted equities.

4. VENDEE — *deed.* When a vendee who has contracted for the purchase of land, and sold it to another, the latter will be entitled to receive from the first vendor the same kind of deed, which he contracted to give his vendee, if the latter purchaser elects to resort to him for a conveyance.

WRIT OF ERROR to the Circuit Court of Henry county; the Hon. IRA O. WILKINSON, Judge, presiding.

This was a suit in chancery, in the Henry Circuit Court, brought by Ellis Blackwell, Maria Blackwell, Eliza Ann Gibbs, Sarah E. Gibbs, Webster C. Gibbs, Lauretta C. Gibbs, and Ellen L. Gibbs, against Russell Gibbs and Frederick P. Brown.

[*192] The bill alleges, that Asahel Gibbs died, on the 17th day of July, 1859, intestate, leaving complainant, Eliza Ann Gibbs, widow, and the other complainants his sole heirs at law.

That in the lifetime of Asahel, defendant Russell Gibbs, on the 23d day of August, 1855, purchased of defendant Brown, the S. W. $\frac{1}{4}$, T. 17, N. R. 2, E. of the fourth meridian, and took a bond for a deed therefor. That on the 20th of September, 1857, Asahel Gibbs agreed with Russell Gibbs, that he would pay Brown $169, of the purchase money, and Russell agreed that Brown should convey to Asahel when he should make the payment, forty acres, in the Northeast corner of the quarter section, ninety rods long and seventy rods wide. That Asahel made the payment to Brown, and Russell gave him a written order to Brown for the conveyance.

That Asahel presented the order to Brown, who made the deed, but held it as an *escrow*. That Asahel took possession, and erected a house and broke and fenced it, and made other lasting and valuable improvements on the land. That Russell Gibbs on the 13th of January, 1859, told Brown that Asahel preferred the land in a square form, and induced Brown to convey the whole quarter to him, under a promise that he would make a deed to Asahel, for his portion of the land. That Russell refused to make the conveyance.

That Russell pretends, that Asahel was indebted to him as executor of their father's estate. They pray Russell be compelled to convey the forty acres to them, or that the deed from Brown to Russell as to the forty acre tract be declared void and Brown be compelled to convey to them.

Brown answered the bill, and admits that he sold the quarter of land to Russell Gibbs and gave a bond for a conveyance. That he is informed, that Russell and Asahel made the agree-

ment charged in the bill. That Asahel paid him the $169, and presented an order on him from Russell Gibbs, for a conveyance of the forty acres, which he made, but did not deliver, because Asahel did not call for it; that Asahel took possession of the land and made the improvements as alleged in the bill. That about a year afterwards, Russell stated to respondent [*193] that Asahel wanted the land in a square form, and desired him to convey to him, and promised that he would convey to Asahel; that acting in good faith he did convey to Russell.

Russell Gibbs answered admitting his purchase of Brown; his sale to Asahel as charged in the bill; but insists that the land was to be conveyed to Asahel in trust. That he held property of John Gibbs, an idiot, as his trustee, and that the land was paid for out of that fund. Admits that he gave the written order to Brown, to convey to Asahel, and that he told Brown that Asahel wanted the land in a square form. Denies fraud in procuring the deed, but admits that it was in accordance with an agreement between himself and Asahel. Admits that Asahel made the improvement on the land as charged. Admits that Asahel and his widow had taken care of John Gibbs, the idiot; but insists that the rents and profits of John's property were more than sufficient to pay therefor. And that complainants are the heirs at law of Asahel Gibbs. He offers to convey the forty acres to any suitable person who may be appointed trustee for John Gibbs.

Replications were filed to the answers. And a cross bill was filed by Russell Gibbs praying the appointment of a trustee for John Gibbs, Jr., which was also answered.

On the hearing in the court below, a decree was rendered, canceling the conveyance, for the forty acre tract described in the bill, from Brown and requiring him to convey the same to complainants by a good and sufficient deed, and dismissing the cross bill of Russell Gibbs; and that he pay the costs.

Defendants bring the case to this court and assign the following errors:

1. The court erred in rendering the decree aforesaid in manner and form aforesaid.

2. The court erred in rendering the decree aforesaid without having the proper parties before the court.

Messrs. GLOVER, COOK & CAMPBELL, for plaintiffs in [*194] error:

1. All persons in interest must be joined either as complainants or defendants. Story's Eq. Pl., sec. 72; *Martin* v. *Dryden*, 1 Gilm., 209; 2 Johns. Chy R., 239; Hill on Trustees, 519; *Greenup* v. *Porter*, 3 Scam., 65; *Scott* v. *Moore*, 3 Scam., 65;

Willis v. *Henkerson*, 4 Scam., 315; *Montgomery* v. *Brown*, 2 Gilm., 581; *Webster* v. *French*, 5 Gilm., 254; *Whitney* v. *Mayo*, 15 Ill., 255; *Skiles* v. *Switzer*, 11 Ill., 533; *McDowell* v. *Cochran*, 11 Ill., 34; *Bank of U. S.* v. *White*, 8 Peters, 262; *Hoare* v. *Harris*, 11 Ill., 25.

And courts will take notice of the omission of proper parties though no demurrer be interposed, where it is manifest that the decree will affect the interest of such as are not joined. *Herrington* v. *Hubbard*, 1 Scam., 573.

That John Gibbs, the idiot, was a necessary party there can be no doubt. The whole estate, after the death of Euphenia, was, under the will of John Gibbs, Sr., held for his sole use and benefit, and to be applied solely to his maintenance and support. He then was virtually interested in the result of the suit. He was incapable of supporting himself, as all the proof shows, and this property was all he had to depend upon. It seems to us a stronger case cannot be found.

The heirs at law of John Gibbs, Sr., are all interested as entitled to the remainder of the estate, as the will provides that it shall go to them after the death of the idiot.

2. The decree is erroneous, because it is against the evidence. It orders Brown to convey by a warrantee deed, and there is no evidence whatever that he was bound to do so by his bond. He had conveyed the whole quarter to Russell Gibbs in good faith, as both parties to this controversy agree. Russell had taken a quit-claim for the whole tract, and it is the reasonable and legal presumption that this was all that Brown was legally bound to give by his contract.

[*195] Mr. GEORGE W. SHAW, for defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

This was a bill in equity exhibited for the purpose of compelling a specific performance of a contract, and to enforce a conveyance of the land in controversy. The bill alleges that the purchase was made, the consideration was paid, possession taken, and valuable improvements put upon the land, by the purchaser. That a deed was executed by Brown at the request of defendant Gibbs, of whom the ancestor of complainants had purchased, which was never delivered, but Russell Gibbs induced Brown to convey to him, he at the time promising to convey to Asahel Gibbs, according to their agreement. The facts are admitted by the answers of defendants; but Russell Gibbs sets up, to defeat a conveyance to complainants, that the money which was paid for the land, was a trust fund of John Gibbs, Jr., an idiot, which had come to the hands of Asahel, under the will of their father, for

the support and maintenance of John. Defendant Gibbs submits to convey the property to any suitable person the court may appoint, to hold the same in trust, according to the original design of its creation.

The question as to the relief sought by the cross bill was not urged on the argument, and we therefore treat it as abandoned. It is, however, insisted that the court erred in refusing to treat the property as a trust fund, and in not dismissing the bill for want of proper parties. According to the view which we take of the case, it is unnecessary to inquire whether the land was trust property, or the money with which it was purchased was a trust fund. If it was such, then John Gibbs had the beneficial interest in the property; and the general rule that all persons having an interest in the subject matter of the suit must be made parties, is urged for a reversal. To this rule there are some well recognized exceptions, and it is insisted by the other side that this case falls within one of them.

In Story's Equity Pleadings, sec. 226, b, whilst consid- [*196] ering who ought not, or need not be made parties to a bill, the author says: "So in case of a common bill for a specific performance of a contract of sale of real estate, the only proper parties, in general, are the parties to the contract itself. Special cases, indeed may exist, in which the rule may be otherwise; but they stand on their own peculiar ground." He is treating of parties to bills without reference to whether they must be plaintiffs or defendants. According to this authority, it is wholly immaterial whether John Gibbs, Jr. was made a party or not, and this rule is fully sustained by reason and authority. Nor do we discover in the facts of this case any peculiar circumstances which should take it out of the operation of the rule. The vendor is a party on one side, and the heirs of the vendee are parties on the other, and so far as we can see, full and complete justice can be done without having other parties before the court. If defendant Gibbs had claims against the idiot which were a charge on the trust fund, or if equities existed between them proper to be adjusted in this proceeding, then John Gibbs, Jr., should have been made a party; but the case discloses no such circumstances.

If the heirs of Asahel Gibbs are liable to account to John Gibbs for the trust fund, he or his conservator can, when they choose, compel them to do so, and then if he has rights, they, if established will be fully protected. From the evidence there can be no doubt, that Asahel in his lifetime, was entitled to a conveyance of the property to himself. And we do not perceive that it matters in the slightest degree, to Russell Gibbs, whether it was to be held as a trust fund or in his own right. Asahel held the

equitable title and had the undoubted right to have united with it, the legal title. Nor could Russell Gibbs exonerate himself from the liability to convey, by showing, that as between his vendee and some other person, there were unadjusted equities in reference to the property.

[*197] It is also insisted that the decree, requiring defendant Brown to convey with covenants for title, was erroneous. The decree in terms does not require such a conveyance, but requires him to convey by a "good and sufficient conveyance." It appears that when it was proposed that Brown should convey to Asahel Gibbs, he prepared a warranty deed. And when it is remembered that this deed was prepared according to the agreement of all the parties, we may safely conclude that Asahel was to have a deed containing a covenant of warranty, and this the decree has required, and no other. And if such was the understanding, Russell Gibbs could not defeat it by receiving a quit claim deed for the premises from Brown. He had agreed to convey to Russell Gibbs by warranty deed, and no reason is perceived why he should not, under the agreement to convey to Asahel, execute to him the same kind of a conveyance. It in no way increases his liability, but is in accordance with his contract. There is no evidence that there was any agreement that Asahel should receive from Brown a quit claim deed. We perceive no error in this portion of the decree.

Upon a careful examination of the entire record we perceive no error requiring the reversal of the decree, and it must be affirmed.

Decree affirmed.

WILLIAM BROWNELL
v.
NORVAL DIXON.

1. PERSONAL PROPERTY — *what is evidence of ownership.* The possession of personal property is *prima facie* evidence of ownership, and the term, "personal property," applies as well to notes and money, as to goods and chattels.

[*198] 2. AGENCY — *husband may act as agent of wife.* A husband may act as the agent of his wife, in the control and management of her personal property, either generally, or under special instructions, but she should be careful to see that her husband is acting, in truth and in fact, in that character, as very slight circumstances, may, in certain cases, be sufficient for a jury to infer, that the property he is managing, is really his own, and not that of his wife.

APPEAL from the Circuit Court of McLean county; the Hon. J. M. SCOTT, Judge, presiding.

This was an action of replevin commenced in the Circuit Court of McLean county, by William Brownell against Norval Dixon, the sheriff of that county.

The declaration is in the *cepit* and *detinet*, for two billiard tables. The defendant pleaded: First, That the property was not the property of the plaintiff; Second, That it was the property of Byron W. Gray; Third, An avowry as to the taking, as sheriff of McLean county, and the detention, by virtue of an execution from the McLean Circuit Court in favor of one Thomas Ashley, and against Bryan W. Gray, issued May 29, 1863, on a judgment in favor of Thomas Ashley, and against Byron W. Gray, for eighty-eight dollars and twelve cents and costs; And fourth, a plea denying the unjust detention charged. To these several pleas, replications were filed and the issues made up, which were tried by a jury, and a verdict found for the defendant.

A motion to set aside the verdict and for a new trial was entered by Brownell, on the ground that the court erred in giving the instructions asked by the defendant, particularly the sixth instruction; and that the verdict was contrary to law and evidence.

This motion was overruled and exceptions taken. Judgment was rendered on the verdict, from which this appeal is taken, and the following errors assigned on the record:

The court erred, to the prejudice of the appellant, in giving the instructions for the defendant.

In giving the sixth instruction.

In overruling the motion for a new trial.

The facts of the case appear to be that one E. B. Steere, [*199] on the 20th of February, 1863, gave, as he testified, as a present to the wife of Byron W. Gray, who was his sister, four promissory notes of one thousand dollars each, all dated on the 20th day of February, 1863, and due in four, six, eight and twelve months, respectively, and payable at the Home Bank, in Bloomington, with seven per cent. interest from date. Steere paid two of the notes, one of them by a check on the bank and the other at different times. Steere stated, that Gray bought a saloon with the billiard tables, for Brownell, but was not present at the trade. He said he furnished the money to plaintiff to make the last payment on the tables, and he has refunded it; that Gray took possession of the saloon and carried it on until he was taken with the sickness which terminated in his death. Steere said he paid on the second note he had given to Mrs. Gray, money to B. W. Gray sometimes, and sometimes to Mrs. Gray, but don't know that he ever saw the notes in the hands of B. W. Gray, who had not much money at that time; he had acted as clerk for Steere at sixty-five dollars a month but as Steere thought he was not worth his wages, he told him to leave, which he did.

It appears that B. W. Gray owed for goods he had purchased

in New York and elsewhere, about twenty-four thousand dollars, which Steere undertook to pay, he receiving from Gray the goods, at about fifty per cent. less than cost. Steere's statement is, that he was residing in a town in Western New York where he had been doing business as a merchant for a number of years, when a message came to him from Gray's creditors in New York, requesting him to go out to Bloomington and buy out Gray's stock at fifty cents on the dollar and pay them the amount. He went to New York and had a conference with the creditors, but finally returned home without making any arrangement and with no intention of doing anything in the matter. Shortly after returning home, he says a large majority of Gray's New York creditors urged him to come to Bloomington and take the [*200] stock for fifty cents on the dollar of their cost, and pay them; that he came out, invoiced the goods, took them into his own possession and gave B. W. Gray his notes for the amount, and shortly after went to New York and saw the creditors, all but two or three of whom gave him up Gray's paper and took his in lieu, at forty cents on the dollar; he says he gave his notes to the assenting creditors to the full amount of all the purchase money of Gray's stock, and he has paid them up, that on his return with Gray's paper he took up the notes he had given to Gray for the goods, and that the trade with Gray was an honest, fair and *bona fide* transaction. Gray had no money besides the salary of sixty-five dollars a month Steere paid him for clerking — he was poor; that owing to the war the goods he got of Gray rose rapidly in value on his hands, many of them trebled in value before they were sold; that he had made a good thing by this trade, and made a great deal of money on the goods and felt that under the circumstances he was able to make the present to Mrs. Gray of four thousand dollars, having made such a large amount of money on the goods.

Joseph Johnson testified that he saw Brownell pay to Doolittle and Thompson, the money for the saloon and tables — don't know the exact amount, but saw a one thousand dollar, and a five hundred dollar bill and some other money — he was a clerk for Doolittle & Thompson while they owned the saloon. B. W. Gray seemed most active in making the trade for Brownell. He was hired by Gray as a clerk for Brownell. Gray stayed in the saloon and came there almost every night after Steere's store was closed — had seen Gray take the money out of the drawer at night in closing up, but usually Brownell did that — had frequently seen Gray show a thousand dollar Treasury note at the counter before the saloon was purchased.

Mrs. Gray, the widow of B. W. Gray, stated on being released by the plaintiff from any liability on account of the property in

suit, that the notes were a present from Mr. Steere to her; that the saloon was bought with her money obtained from [*201] Steere on the notes, and some $500 more which she had received partly from her mother's estate and partly from Mrs. Wambaugh, whose son she had boarded and nursed through sickness, as a present; that she took no part herself in buying the saloon, but authorized it to be bought for her as it was bought; that her husband, B. W. Gray, had no money of his own in the saloon; that after her husband's death she sold out the whole establishment to the plaintiff, and took plaintiff's notes for some $1,000 and two of these notes have been paid by plaintiff.

It was then admitted by the defendant that the property in controversy was a part of the property described in the invoice as part of the stock of the saloon, and that when he levied on it, it was in the possession of the plaintiff; that the plaintiff claimed it as his, and that he told the plaintiff that the only way by which he could get the property was by replevying it out of his hands.

This was all the evidence for the plaintiff.

For the defendant, *William Doolittle* testified that he was one of the firm of Doolittle & Thompson; that Gray did all the negotiating about the purchase of the saloon, but said he was buying it for some one else; witness did not care who he was buying it for so the money was paid; supposed he was buying for plaintiff; plaintiff paid the money, about $1,800; Gray was present; among the money was a $1,000 greenback that Gray had shown to witness, or a bill of similar amount and kind, and also two or three of the notes from Steere to Mrs. Gray, when talking about the trade, and said he was all right, and could pay for the saloon; that Doolittle & Thompson had given a chattel mortgage to Brunswick & Bro., of whom they had bought the tables, to secure the payment of two notes for $225 each; that as a part of the consideration, these notes were to be taken up; that Gray wanted Brunswick & Bro. to take plaintiff's notes and a new mortgage, as the notes were not yet due; but finally an arrangement was made, Brunswick & Bro. throwing off $25 for prepayment; that some delay was caused from the notes being in Chicago; that when the notes were sent to Blooming- [*202] ton, witness went with Gray, to the office of M. W. Packard, to whom Gray paid the money and lifted the notes; witness was frequently in the saloon; saw Gray there, who seemed to be acting as boss; Doolittle & Thompson delivered possession to B. W. Gray, Gray taking the key.

On cross-examination he stated: Plaintiff was frequently in the saloon and he had seen him at night, when the saloon closed,

take the money from the drawer, and when plaintiff was in the saloon he acted as proprietor, by going behind the bar, etc.

Defendant then called *Thompson*, the other member of the firm of Doolittle & Thompson, who testified substantially as follows:

That Gray was active in buying out Doolittle & Thompson, and after the purchase acted as proprietor. Has seen plaintiff in saloon acting as proprietor. Witness left Bloomington shortly after the sale of the saloon, and did not return till after Gray's death. Saw Gray have a $1,000 Treasury note frequently before the purchase of the saloon.

S. B. Hance testified: That B. W. Gray applied to Messrs. Hance & Toms, lessors of the saloon premises, and inquired of him if they would be willing for him to take the saloon lease, to which witness assented. Did not know plaintiff's name until he saw it when the assignment of the lease was brought to witness for approval. Saw Gray afterwards, generally in charge of the saloon; he seemed to have control. Saw plaintiff there at night, who also seemed to take charge of the business.

Clarkson Toms testified: That he was one of the firm of Hance & Toms; that Gray spoke to him about assignment of lease; don't recollect hearing plaintiff's name mentioned but Gray said he wanted it for a young man or boy that he wanted to give something to do. Hance signed the assignment. Gray seemed to be boss about the saloon. Have seen plaintiff there behind the bar.

[*203] *M. W. Packard* testified: That Gray paid him the money on the back notes of Doolittle & Thompson as stated by Doolittle. Brunswick then satisfied the chattel mortgage on the tables. Gave the notes to Doolittle. A short time before this, Gray came to his office with Mr. Nightwine, and paid some $200 or $300, balance on a note due the estate of McKisson, which was a lien by mortgage upon his dwelling house, and then inquired for the other note, which was for about $500, and held by another party, and said he had the money and wanted to pay it off. He then showed a pile of money, and said he was all right; don't know whose money Gray had, only from the fact of its being in his possession.

Thomas Ashley, Jr., testified: That B. W. Gray wanted the privilege of his father, the owner of the house, and plaintiff in execution, to get another room in the house, and to make some alterations in doors, etc., saying that he was going to make a big thing of it. Gray paid the rent of a small room adjoining the saloon that Doolittle & Thompson had formerly rented for an oyster saloon.

The defendant then introduced the judgment and execution in

favor of Thomas Ashley, against B. W. Gray, and showed other judgments against Gray for about six thousand dollars.

The plaintiff recalled Steere, who stated that he loaned the money to plaintiff to pay the notes to Brunswick & Bro. secured by chattel mortgage.

On this evidence, the court gave the following instructions for the plaintiff:

1. If the jury believe from the evidence that Mr. Steere gave to Mrs. Gray money or notes as a present, then the money or notes was Mrs. Gray's; and if the jury believe that the property in controversy was bought with this money or notes for Mrs. Gray, then the property becomes Mrs. Gray's; or if they further believe from the evidence that Mrs. Gray sold the property to the plaintiff, then they will find for the plaintiff.

2. If the jury believe from the evidence that the prop- [*204] erty was bought with Mrs. Gray's money for her, or was bought with her money and plaintiff's money, for her and plaintiff, and that Mrs. Gray either sold the whole goods or her interest to the plaintiff, then they should find for the plaintiff.

3. If the jury believe from the evidence that the property in controversy was bought of Doolittle & Thompson with the money of Mrs. Gray and for Mrs. Gray, then the goods were the property of Mrs. Gray, and if they further believe from the evidence that Mrs. Gray sold the property to plaintiff, then they will find for the plaintiff.

4. A husband may act as agent for his wife, in the control and management of personal property of his wife, and if the property controlled by the husband, is in fact the property of the wife, then such control and management by the husband does not alter the title to the property, and if the jury believe from the evidence that the property in controversy was the property of Mrs. Gray, then even if Gray did control and manage it, this did not make it the property of Gray.

5. Fraud cannot be presumed, but must be proven.

And the defendant asked, and the court gave, on his behalf these instructions.

1. The court instructs the jury that if they believe from the evidence that the property in question was really the property of B. W. Gray, the defendant in execution at the time said execution came into the hands of the sheriff, then they were liable to be levied upon by said execution, and the jury will find for the defendant.

2. That if the ownership of the goods in question was in fact in B. W. Gray, and the pretended ownership by Brownell or Mrs. Gray, was fraudulently claimed for the purpose of covering

up said goods and keeping them out of the way of the creditors of B. W. Gray, they will find for the defendant.

3. That the possession of personal property is *prima facie* evidence of ownership, and the term "personal property" applies as well to notes and money as to goods and chattels.

[*205] 4. That the plaintiff in order to recover in this case must prove to the jury by a preponderance of evidence that the property in question was the property of Brownell, the plaintiff.

5. That fraud may be shown by facts and circumstances proven to the jury by evidence.

6. The court instructs the jury that although the notes given by Steere to Mrs. Gray have been in fact her own by a gift from Mr. Steere, yet if the jury further believe from the evidence, that Mrs. Gray gave said notes to her husband, B. W. Gray, to trade upon and expend and lay out as he thought proper, and that said B. W. Gray bought the billiard tables in question without any special understanding or agreement with his wife, Mrs. Gray, that the same should be done in her name, then they became the property of B. W. Gray, as far as his creditors are concerned, and were liable to the execution in favor of Ashley, and the jury will find for the defendant.

To these instructions the plaintiff, at the time, excepted.

Mr. R. E. WILLIAMS & Mr. J. LEAMING for the appellant.

Mr. JUSTICE BREESE delivered the opinion of the court:

The only questions made in this case, arise on the third and sixth instructions given by the court, on behalf of the defendant. The third is as follows: The possession of personal property is *prima facie* evidence of ownership, and the term "personal property," applies as well to notes and money, as to goods and chattels.

The truth of this proposition is not denied, but it is insisted, it was not applicable to the case, and was calculated to mislead the jury.

It appears, certain notes amounting to four thousand dollars, were claimed as having been presented as a gift by one Steere,

[*206] the brother-in-law of Mr. Gray to Mrs. Gray, and which had come to the hands of her husband, B. W. Gray. The court had, before, in the first instruction, told the jury, if they believed from the evidence that Steere gave Mrs. Gray the money or notes as a present, then the money or notes were Mrs. Gray's; and if they believed that the property in controversy was bought with this money or notes for Mrs. Gray, then the property became Mrs. Gray's; or if they further believed from the evidence, that Mrs. Gray sold the property to the plaintiff, then they will find for the plaintiff. To the same effect, are the

second and third instructions. In the fourth instruction, the court distinctly told the jury, on behalf of the plaintiff, that a husband may act as agent for his wife in the control and management of the personal property of the wife, and if the property controlled by the husband, is, in fact, the property of the wife, then such control and management by the husband, does not alter the title to the property, and if they believed from the evidence, that the property in controversy was the property of Mrs. Gray, then, even if Gray did control and manage it, this did not make it the property of Gray.

We think, with these instructions before the jury, they could not possibly have been mislead by anything contained in the third instruction on behalf of defendant. Though the possession of the notes by Gray might be *prima facie* evidence of title in him, it was subject to be rebutted by other facts of the case, to which the attention of the jury had been especially directed by the instructions of the court.

The sixth instruction is as follows:

The court instructs the jury that although the notes given by Steere to Mrs. Gray, may have been in fact her own by a gift from Mr. Steere, yet if the jury further believe from the evidence that Mrs. Gray gave said notes to her husband, B. W. Gray, to trade upon, and expend and lay out as he thought proper, and that said B. W. Gray bought the billiard tables in question without any special understanding or agreement with his wife, Mrs. Gray, that the same should be done in her name, then they [*207] became the property of B. W. Gray, as far as his creditors are concerned and were liable to the execution in favor of Ashley, and the jury will find for the defendant.

The appellant objects to this instruction, for the reason, as he understands it, that it asserts the husband may not act as the general agent of his wife in respect to the management of her separate property; and that unless specifically instructed, in respect to every detail and every item, he can make no purchase with the separate property of the wife as her agent, and that although her instructions may be specific, as to each and every item, yet if the property be purchased in the name of a third party, and with the assent of such third party, and not in the name of the wife, the property can be taken in satisfaction of the debts of the husband, by the husband's creditors.

We do not understand this instruction as countenancing the idea, that a married woman, possessed of a separate property, may not employ an agent to transact her business, either generally or in a particular case, and that she may employ her husband to act as her agent, is nowhere repudiated by the terms of this instruction. The wife must be careful to see that the husband is

acting, in truth and in fact, as her agent and not on his own account. Very slight circumstances, may, in certain cases, be sufficient for a jury to infer that the property he is managing, is, really, his own and not that of the wife—that she has left it at his own disposal, abandoning her own control over it and bestowing it upon him. This she may do, and a jury will not require much persuasion, in a proper case, to induce them to come to such a conclusion. This instruction left the jury to determine, from the whole evidence, whether the money of Mrs. Gray was, or not, given to her husband for his purposes, or to be invested for the benefit of his wife. This was the question fairly before the jury by the instruction, and they have found, and [*208] we think properly, the purchase of the saloon and billiard tables was an investment for the benefit of Gray, and with his own means. We say with his own means, because it is apparent from the testimony, that the notes of four thousand dollars, a part of which paid for this property, were the property of B. W. Gray, he and Steere having combined together to defraud his creditors by a sale to them of the stock of goods, at fifty cents on the dollar of their value, out of which, Steere admits, he made from two to three hundred per cent. over and above the cost. In equity and justice, the profits belonged to Gray's creditors and to Gray himself, a part of which he received through this pretended gift of four thousand dollars to Mrs. Gray. The whole transaction seems to us, an iniquitous one, by which, no person concerned, should be allowed to profit.

Another suggestion may be properly made. The witness, W. Doolittle says, that this property was bought by Gray for the plaintiff Brownell, who paid the money.

Mrs. Gray, in her evidence states, that after her husband's death, she sold out the whole establishment to the plaintiff, and took his notes therefor. The jury must have concluded from these different statements, that the appellant was a mere cover for Gray, and were warranted in believing the funds with which he was operating, were really his own, being his share of the proceeds of the fraud practiced on his creditors through the agency of Steere. The whole record shows a clear case against the appellant, and does not present such a case as the act of 1861 was designed to protect. The evidence fully sustains the verdict.

Perceiving no error in the instructions complained of, and no error in the record, the judgment must be affirmed.

Judgment affirmed.

PETER KERNIN [*209]
v.
JAMES M. HILL.

EVIDENCE—*proof of handwriting.* The genuineness of a signature cannot be proved on the trial of a cause by comparing it with another signature admitted to be genuine.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of assumpsit brought by the defendant in error against the plaintiff in error at the December term, 1862. The plaintiff below had judgment, and the defendant sued out a writ of error. The facts are sufficiently stated in the opinion.

Messrs. WILSON & ASAY for plaintiff in error.

Mr. JAMES M. HILL *pro se.*

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

On the trial of this case, experts were called by the plaintiff below, to whom were shown the signatures of certain affidavits made by the plaintiff, and on file on the cause, and they were asked and permitted to state, against the objections of the defendant, whether the signatures to the affidavits and to the notes sued on were by the same person. This was error. Whatever we might be inclined to hold were the question before us for the first time, it must be considered the law of this State, that the genuineness of a signature can not be proved by comparing it with another signature admitted to be genuine. *Jumpertz* v. *The People*, 21 Ill., 408.

Judgment reversed.

WILLIAM TRUESDALE [*210]
v.
GEORGE FORD.

1. NOTICE OF UNRECORDED DEED—*by possession of property.* Possession, under an unrecorded deed, to be notice to subsequent *bona fide* purchasers, must be open, visible and exclusive; and must apprise the community that the occupant under the unrecorded deed has appropriated the property to his exclusive use.

2. OCCUPANCY—*its character.* If the premises thus held are only occupied in common with others, and the public generally, it does not afford notice—it would not be hostile, or afford evidence that it was made under, or in the assertion of title. It will be presumed that all persons, before purchasing lands, will inform themselves of its condition, and if occupied, learn under what right.

3. SAME—*what constitutes.* Possession of land may be held in different modes, by enclosure—by cultivation, by the erection of buildings, or other

improvements; or, in fact, by any use that clearly indicates an appropriation to the use of the person claiming to hold the property.

4. JURY — *are to find the fact.* It is the province of the jury to find, under proper instructions, whether possession is proved And their finding will not be disturbed unless manifestly against the evidence.

APPEAL from the Circuit Court of Peoria county; the Hon. S. L. RICHMOND, Judge, presiding.

This was an action of ejectment, commenced by George Ford, against William Truesdale, on the 5th day of December, 1860, in Peoria Circuit Court, to recover lot eleven, in block eighteen, in the city of Peoria. To the declaration, the plea of the general issue was filed. Afterwards, at the February term, 1864, of the court, a trial was had before the court and jury. On the trial, plaintiff introduced evidence of a title derived from the United States. to John Ford; a copy of a deed from him to George Oakley for the same premises, dated the 21st of January, 1846, and recorded on the 3d of February of the same year.

[*211] Also a quit-claim deed, for the same premises, from George Oakley to Hugh McGinity, dated the 13th of June, 1855, and recorded the 15th day of the same month. Also a deed from McGinnity to plaintiff, dated the 1st of August, 1857, but never recorded. Plaintiff then introduced *George McFadden*, the county surveyor, who identified the plat of the lot in dispute, and the adjoining grounds.

Defendant, Truesdale, then introduced the original deed from John Ford to George Oakley. Next, a deed from Oakley to Edward F. Nowland, for the same lot, dated the 2d of April, 1849, and recorded the 6th of September, 1855.

There was also a large amount of evidence introduced to prove that plaintiff in error, who derived title from Ballance, was in possession of the premises. That Ballance, as early as in 1851, claimed the premises in controversy, and leased them to Sweeney & Littleton at one dollar per month, and that they took possession of the lot and used it for piling saw logs and lumber in connection with their mill, which was situated on an adjoining lot, and so held it until in 1855. That Truesdale acquired the lot, and went into possession at the time Sweeney & Littleton ceased to occupy it. That he had held it ever since until the trial below.

On the other side, evidence was introduced to prove that the lot was not so occupied by Sweeney & Littleton, and Truesdale, but that the lot occupied by them was a different lot, which adjoined the one in controversy. Also to prove that the mode in which the lot was used did not amount to such possession as indicated who, if any person, claimed to occupy it.

The evidence on the question of possession by defendant, and

those under whom he claimed, was conflicting, and, to some extent, contradictory.

The jury found a verdict for the plaintiff; and the defendant entered a motion for a new trial, which was overruled by the court; and a judgment was rendered on the verdict. Defendant brings the case to his court by appeal, and assigns the following, among other errors:

In refusing to give instructions asked by appellant. [*212]

In giving appellee's instructions.

In refusing to grant a new trial to appellant.

Because the judgment should, on the whole record, have been for appellant.

Mr. CHARLES BALLANCE, for appellant, cited the following authorities: *The Inhabitants of Worcester* v. *Eaton*, 11 Mass., 368; *Lake* v. *Haynes*, Ib., 498; *Peterson* v. *Willing*, 3 Dall., 506; *Sanger* v. *Tilton*, 1 Rawle, 141; *Baring* v. *Shippen*, 2 Binn., 154; *McFarman* v. *Powers*, 1 Serg. & Rawle, 102; *Browning* v. *Downing*, 4 Serg. & Rawle, 494; *Nichols* v. *Halgate*, 2 Aik. Ver. R., 138; *Taylor* v. *Beck*, 3 Rand., 316; *Boring* v. *Reeder*, 1 Hen. & Munf., 154; Philips' Ev., 1, 118-130, notes and the text page 130.

Mr. JOHN T. LINDSAY for appellee:

The whole testimony, taken together, shows that the possession was not exclusive or marked in its character. Every man, in passing the premises, seeing saw logs, lumber and slabs in street and vacant ground close to saw mill, would naturally suppose that they used it for temporary purposes. *Irving* v. *Brownell*, 11 Ill., 402; *McConnell* v. *Reed*, 4 Scam., 123.

A deed must be signed, sealed and delivered. 4 Kent, 449; *Pile* v. *McBratney*, 15 Ill., 317.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

This was an action of ejectment, for the recovery of a lot of ground in the city of Peoria. There is no dispute of the fact, that the title, at one time, was in George Oakley; and both parties claim to derive title from him. Appellant, through a deed executed by him to Nowland, dated the 2d day of April, 1849, but not recorded until the 5th day of September, [*213] 1855. Next, a deed from Nowland to Charles Ballance, dated the 24th day of April, 1849, and recorded the 15th of June, 1855. And lastly, a lease from Ballance to himself, dated the 1st day of December, 1855.

Appellee claims title under a deed of conveyance from Oakley to one McGinity, dated the 13th of June, 1855, and recorded the

15th day of the same month. Also a deed from McGinity to himself, dated the 1st day of August, 1857, but never recorded. It thus appears, that the deed from Oakley to McGinity was recorded before the deed from Oakley to Nowland.

To avoid the effect of the prior record of the deed to McGinity, appellant introduced evidence tending to show that Ballance leased the lot to Sweeney, Ham & Co., and afterwards to Sweeney & Littleton, who owned a saw and planing mill, and a sash factory on a lot across a street and opposite the premises in controversy as early as in the year 1850 or 1851, and that they used the lot for the purpose of piling saw logs, lumber and other material in connection with the mill. And it is insisted that this was such possession as put McGinity, and all others dealing with the property, upon inquiry; and was notice equal to the record of Oakley's deed to Nowland.

Notice by possession of the premises, to be sufficient, must be of that open, visible character which, from its nature, is calculated to apprise the world that the property has been appropriated and is occupied; also who the occupant is; or from which the occupant may be readily ascertained; and it must be such a use and occupancy as the property is adapted to; and such possession, if calculated to give notice of the fact, is all that the law requires. Whatever may be the character of the occupancy or the improvement, it must still be exclusive. If only used and enjoyed in common with others, or with the public in gen-
[*214] eral, it could not be regarded as hostile to other persons claiming title; or as being made under claim of title. It must be of such a character as, in its nature, is calculated to arrest the attention, and put any other person claiming title upon inquiry. It may well be supposed that all men, before they purchase real estate, take the necessary precaution to learn its situation; and if found to be occupied, that they will institute the necessary inquiry to ascertain by whom, and in what right. In this case, there was evidence proper for the consideration of the jury to determine whether the stacking of lumber, and the piling of saw logs on this lot, in such quantities, and so continuously, as the evidence seems to show, was an open, visible and exclusive possession by Ballance's lessees. If it was, then it was notice to McGinity, and it was his duty to institute such inquiries as would have led him to a knowledge of the facts. If the jury had so found, the law would presume that he had made the inquiry and had learned the facts, as to who was in possession and under what title he claimed to hold the property.

In the case of *Ewing* v. *Burnett*, 11 Pet., 50, the Supreme Court of the United States went farther, perhaps, than would have been required under the facts in this case, to hold this a

possession. In that case, it was held, that the claim of the exclusive right of digging and removing sand and gravel from a vacant and uninclosed lot, by a grantee of the land, by giving the privilege to some, and refusing it to others; and bringing suits for tresspass against persons removing sand and gravel, without permission; and at different times making leases to various persons, for the purpose of taking gravel and sand therefrom, besides taking it for his own use as he pleased, constituted adverse possession. And in the case of *Rupert* v. *Mark*, 15 Ill., 540, this court held, that notice of a prior unrecorded deed, by a subsequent purchaser at the time he takes his conveyance, will defeat his title. That by such notice he is as effectually bound as if the prior conveyance had been recorded at the time of his purchase. It was also held, that whatever is sufficient to put [*215] a purchaser upon inquiry, will operate as notice of the former conveyance; and that possession of the premises by the first purchaser is sufficient to put the subsequent purchaser on inquiry, as to the title under which it is occupied. And it was also held, that any facts which could have been ascertained by ordinary diligence, will be presumed to have come to his knowledge. The doctrine of such notice, as actual occupancy, being equal to the record of the deed, seems to be fully recognized and supported by authority, and it has been repeatedly acted upon by this court, and is now regarded as a settled rule in our jurisprudence.

The court below, at the instance of plaintiff, gave this, together with other instructions: "The mere piling of wood or lumber, or rails or offal upon a tract of land or lot, unaccompanied by any other act denoting ownership, is not such possession of the land or lot as would constitute notice to a *bona fide* purchaser of such tract of land or lot, unless such piling of wood or lumber should constitute, in the estimation of the jury, an open, visible and exclusive possession of the lot in the person piling such wood or lumber." It is insisted that this instruction should not have been given. That these firms used the lot for the purpose of piling saw logs and of lumber to dry, and for sale, continuously, from the time of receiving the lease from Ballance, until the sale to appellant, there seems to be evidence in the record. There was evidence that Sweeney & Littleton leased to appellant, in 1854 or in 1855, who soon after erected upon it a finishing shop, and he was still in possession in 1863. And that appellant obtained possession from Ballance, under whom he always claimed possession.

The question then arises, whether the possession of Sweeney & Littleton was so open, visible, notorious and exclusive as to be calculated in its very nature, to inform persons in the vicinity, and those seeing the property, that some person had appropriated

it, and was using and occupying it for his own use. Such an appropriation may be manifested in various ways. It may
[*216] by enclosure, by cultivation, by the erection of buildings, or other improvements, or, in fact, by any use that clearly indicates its appropriation and actual use, by the person claiming to hold it. And these are all questions for the determination of the jury, under proper instructions, if asked. This instruction was in accordance with these principles, and the court committed no error in giving it; nor can we say that the finding of the jury is so manifestly against the weight of evidence that it should be set aside.

It is likewise objected, that the court erred in refusing to give a portion of the instructions asked by appellant. We are unable to say that error exists, for this reason, as he has failed to bring up those which were given in his favor. For aught that appears, those given may have stated the law of the case fully and correctly to the jury. Appellant alleges error, and he must show it. He has not brought all of the record of the court below into this court; and having failed to do so, we will not presume that if it was before us, it would show error in the record; but we must rather presume that the instructions, if here, would sustain the finding and the judgment. There being no error discovered in the record, the judgment of the court below must be affirmed.

Judgment affirmed.

JOHN R. SNYDER
v.
CALVIN GRISWOLD.

1. MORTGAGE—*what.* Where a deed is given, absolute on its face, and a written agreement executed the same day, by which the money was to be paid by a certain day, the entire transaction will be considered as a loan, with mortgage security on the land conveyed.

2. SAME—*parol proof to vary agreement.* Parol proof cannot be received to vary such written agreement, the more especially when, in the defeasance, there is an express stipulation to pay the money due by a day named.

[*217] 3. SAME. All conversations anterior to the examination of the writings are considered as merged in the writings, and they must speak the contract of the parties.

4. SAME—*decree of foreclosure giving interest.* Usury having been established, it was error to allow legal interest on the amount found to be due by the mortgage.

5. SAME—*usury in.* A party seeking to foreclose a mortgage tainted with usury, and the usury being established, a forfeiture of all interest is the necessary consequence. If, however, the mortgagor was seeking relief against a usurious mortgage, then the court could require him to pay legal interest, on the principle that he who asks equitable relief, should do equity, and equity would require him to pay legal interest. In such case, a court of equity could prescribe the terms of its interference.

Held, therefore, a decree giving the mortgagee legal interest, the usury being established, was error.

APPEAL from the Circuit Court of LaSalle county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

This was a bill in chancery in the Circuit Court of LaSalle county, filed by Calvin Griswold, against John R. Snyder, to foreclose a mortgage.

It appears by the record that Snyder, being indebted to Griswold in the sum of seventeen hundred and ninety-one dollars, on the first day of June, 1859, executed, on that day, to Griswold, a deed for certain lands in this State, and in Minnesota and Iowa, which deed was absolute on its face, but there was, at the same time, an agreement executed by both parties, which is fully set out in the opinion of the court, by which Snyder covenanted to pay the money due, on the 1st day of January, 1864, and Griswold was to make a deed for the premises on such payment being made.

The testimony taken before the master was that of Jacob W. Brown and John R. Snyder, the mortgagor and defendant in the suit, and *Calvin Griswold*, the complainant.

Brown testified that Griswold was to take the land absolutely in complete payment of the debt, but Snyder was to have the right to sell it to some one else, and save something out of it if he could within the time prescribed in the contract.

Snyder testified to the usurious nature of the loan, and [*218] Griswold did not deny it, he only contesting the amount of usury.

The Circuit Court found the transaction was usurious, and rendered a decree for the amount found to be due with legal interest thereon, and ordered a sale of the lands lying in LaSalle county, to satisfy the decree.

Snyder prosecutes this appeal, and assigns for error this decree.

Messrs. GRAY, AVERY & BUSHNELL, for appellant, made the following points:

1. The evidence did not warrant the court below in finding the deeds and contract a mortgage.

The case of *Miller* v. *Thompson*, 14 Ill., 428, lays down the law in such transactions as the appellant claims this to be.

We understand the court in that case to decide that it is a question of fact as to the understanding and intention of parties at the time, whether a deed shall be considered a mortgage or an absolute conveyance, and verbal testimony is admissible to determine the question.

On this point, J. W. Brown was the only witness, and he is uncontradicted and unimpeached, and no court has authority to disregard his testimony.

He states emphatically that the appellant refused to make a

mortgage, but would turn out the property in payment of the debt, which he did, and Griswold accepted it.

2. A defendant in a suit in chancery, who pleads usury, and the plea is proven, is entitled to a forfeiture of all the interest. *Fanning* v. *Dunham*, 5 Johns. C. R., 122; 1 Story's Eq. Jur., 333, sec. 301.

Messrs. GLOVER, COOK & CAMPBELL for the appellee:

1. This was a bill for the foreclosure of a mortgage, filed in the court below by appellee, who alleged in his bill that Snyder, being, on the 1st day of June, A. D. 1859, indebted to [*219] him in the sum of $1,791, executed and delivered to him his deed for certain lands, (one tract in the county of La-Salle, one in Minnesota and one in Iowa,) which deed was absolute on its face, but that there was at the same time a defeasance executed by both parties, in and by which Snyder covenanted to pay the money on the first day of January, 1864, and Griswold to execute a deed for the premises upon such payment.

The deed of defendant having been given for an antecedent debt, and the defeasance containing a covenant to pay the debt, will be construed together and operate as a mortgage. *Delahay* v. *McConnell*, 4 Scam., 158; *Miller* v. *Thompson*, 14 Ill., 431; *Davis* v. *Hopkins*, 15 Ill., 520; *Smith* v. *Sackett*, Ib., 430; *Williams* v. *Bishop*, Ib., 555; *Wynkoop* v. *Cowing*, 21 Ill., 580; *Tillson* v. *Moulton*, 23 Ill., 650; *Brown* v. *Gaffney*, 28 Ill., 156.

The covenant of Snyder might have been enforced by suit at law for the recovery of the money, and he is not excused by the penalty provided in the agreement, which might, at the option of Griswold, have been enforced. *Raymond* v. *Caton*, 24 Ill., 126.

2. The appellant insists that the evidence of Brown shows that it was not the intention of the parties to make a mortgage, but to satisfy the debt.

First, The evidence was incompetent, and should not have been admitted.

Brown was allowed to detail the conversation of the parties which took place before it was reduced to writing.

The bargain being reduced to writing, and the agreement signed and sealed by the parties, it could not then be contradicted or explained. *Broadwell* v. *Broadwell*, 1 Gilm., 600; *Lane* v. *Sharp*, 3 Scam., 572; *Harlow* v. *Boswell*, 15 Ill., 57; *Abrams* v. *Pomeroy*, 13 Ill., 136; *Rawson* v. *Curtiss*, 19 Ill., 473; *Farrar* v. *Hinch*, 20 Ill., 649; *Robinson* v. *McGarity*, 28 Ill., 427.

By the sealed contract of the parties, Snyder covenanted to pay the $1,791 January 1st, 1860.

If the parol evidence is admitted, it will render this [*220] covenant absolutely void.

We insist that wherever the defeasance is in writing, *under seal*, this writing is the *only* evidence of the contract of the parties, but a parol defeasance may be shown by parol. *Snapp* v. *Pierce*, 24 Ill., 158. See also, for review of what is evidence in a case of this kind, *Sutphen* v. *Cushman*, decided at the last term.

Second, Brown's testimony itself shows that this transaction was a mortgage.

And once a mortgage, always a mortgage. *Wynkoop* v. *Cowing*, 21 Ill., 580; *Tillson* v. *Moulton*, 23 Ill., 656.

The second point made by appellant is, that the court erred in giving Griswold six per cent. on his money. (There is no controversy as to amount except this.)

The court is referred to cases supposed to bear out this view, but this court has already decided the question of interest in our favor in *Heacock* v. *Swartwout*, 28 Ill., 298; *Nichols* v. *Stewart*, 21 Ill., 106.

The case, 28 Ill., 298, above cited, is directly in point. Complainant below sought to foreclose an equitable mortgage, (he holding absolute title, but admitting a defeasance,) and to have the land sold for the debt.

Defendant, among other things, set up usury, and the court say the transaction was a mortgage, *and the complainant had the right to have his money back, with interest at six per cent.*

The case cited and the one at bar are precisely alike.

If the decree were erroneous in allowing interest, this court would modify the decree here so as to require the payment of the $1,300 only, that being the amount of the principal sum unpaid, *Pearsons* v. *Hamilton*, 1 Scam., 415; *Prince* v. *Lamb*, Breese, 300; *Fuqua* v. *Robinson*, 5 Gilm., 128.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was a bill in chancery in the LaSalle Circuit Court to foreclose a mortgage. The facts are substantially, that appellant, being indebted to appellee, executed to him [*221] three several deeds, absolute on their face, one for a tract of land in LaSalle county, one for a tract of land in the State of Iowa, and the other for several tracts of land in the State of Minnesota. Two of these deeds were executed by appellant and wife on the 31st day of May, 1859, and the other on the 1st day of June, 1859, and on the last named day, appellee executed and delivered to appellant the following writing:

Articles of agreement, made this first day of June, in the year of our Lord one thousand eight hundred and fifty-nine, between Calvin Griswold, party of the first part, and John R. Snyder, party of the second part, Witnesseth, that the party of the first part, at the request of the party of the second part, and in consideration of the money to be first paid, and the covenants herein expressed, to be first performed by the party of the second part, hereby agrees to sell and assure to the said party of the second part, by a good and sufficient deed, the following parcels or tracts of land, situated as follows, viz.: One parcel situated in LaSalle county, and State of Illinois: The north half (½) of the northeast quarter (¼) of section twenty-one (21,) in township thirty-six (36,) north of range two (2,) east of the third principal meridian, containing eighty acres, be same more or less; another parcel of land situated in Cerro Gordo county, and State of Iowa: The southeast quarter (¼) of section one (1,) in township ninety-five (95,) range twenty (20) west, containing one hundred and sixty acres, be same more or less; and also another parcel of land situated in Pine county, and State of Minnesota: One-half (½) of the following described pieces of land: The east half (½) of the southwest quarter (¼) and southwest quarter (¼) of the southwest quarter (¼) and southeast quarter (¼) of the northwest quarter (¼) and southwest quarter (¼) of northeast quarter (¼) and northwest quarter (¼) southeast quarter (¼) of section three (3;) and also north half of west half of northeast quarter (¼) and the north half (½) of the east half (½) of the [*222] northwest quarter (¼) of section ten (10,) in township thirty-eight (38,) range twenty-five (25,) containing three hundred and seventy acres in all, meaning to convey to said Snyder one hundred and sixty acres, with the privileges and appurtenances thereunto belonging, or in anywise appertaining; and the said party of the second part, in consideration of the premises, hereby agrees to pay to the said party of the first part, or his attorney, executors, administrators or assigns, the sum of seventeen hundred and ninety-one dollars, as follows, to wit, the whole to be paid on the first day of January, in the year of our Lord eighteen hundred and sixty; also that he will well and faithfully, in due season, pay or cause to be paid, all taxes and assessments, ordinary or extraordinary, that may be levied, assessed or imposed upon the said premises or appurtenances; and it is mutually covenanted and agreed by and between the parties hereunto, that in case the said party of the second part shall make default or fail to make any of the payments above mentioned at the time and times above limited, (the said time and times of payment being hereby declared to be an assented part of the contract,) or shall fail to perform any of the covenants on his part, then, in such case, this agreement and all the covenants and agreements on the

part of the said party of the first part, herein contained, shall, at the option of the said party of the first part, his representatives and assigns, be, and are hereby declared to be null and void, and no longer binding, and all the right or interest, either in law or equity, of the said party of the second part shall cease and be determined, and all payments which shall then have been made hereon, or in pursuance hereof, shall be absolutely and forever forfeited to the said party of the first part.

In witness whereof, the parties to these presents have hereunto set their hands the day and year first above written.

The defense set up was usury, and that the sale was absolute and not intended as security for the money loaned.

Apart from any other evidence, these deeds, accompanied by this defeasance, constituted the transaction a mortgage beyond all question, and "once a mortgage always a mort- [*223] gage" is a familiar principle.

The question then is, can the character of this transaction be changed by parol evidence? It will be observed, in the defeasance, there is an express stipulation by appellant, to pay the money due by a day named. The testimony of Brown, who was examined as a witness on the part of the appellant, is to the effect that it was an absolute sale for the purpose of paying the debt, and that it was not appellant's intention, or that of appellee, to make a mortgage, but to satisfy the debt, by the absolute conveyance of the lands.

We would infer, from the testimony of Brown, that this conversation was prior to the consummation of the contract, and when that was reduced to writing, the writing must control. All anterior verbal conversations are merged in the writing, and that alone must declare the agreement of the parties. The express covenant to pay the money, as contained in the defeasance, cannot be destroyed by the parol evidence of Brown. To allow it to have that effect, would be setting aside one of the most valuable rules and principles of evidence, and open a door for forgeries innumerable. We must hold the transaction was a mortgage only.

It is insisted, also, by the appellant, that the decree is erroneous, in allowing six per cent. interest on the amount due, after disallowing the usurious interest.

A moment's consideration will satisfy any one that there is error in this. The appellant in this proceeding sought to enforce, by the foreclosure of the mortgage, the payment of a note tainted with usury. The fact of usury is established, and the Statute declares a forfeiture of all the interest. Had appellant sought relief from his contract on the ground of usury, it would have been competent for the court, by its decree, to have compelled him to pay legal interest, on the principle that "he who asks equity must

do equity," and equity in such case would require he should pay legal interest. A court of equity in such case could pre-
[*224] scribe the terms of its interference. It would be against conscience that the party should have full relief, and at the same time pocket the money loaned, which may have been granted at his own mere solicitation. 1 Story's Eq. Juris., sec. 301.

In *Fanning* v. *Dunham*, 5 Johns. Ch. R., 141, KENT, Chancellor, says, he takes the rule to be that a plaintiff who comes to a court of equity for relief against a judgment at law, or other legal security, or on the ground of usury, cannot be relieved except upon the reasonable terms of paying to the defendant what is really and *bona fide* due to him. On the other hand, if the party claiming under such usurious judgment, or other security, resorts to this court to make his claim available, and the defendant sets up and establishes the charge of usury, the court will decide according to the letter of the Statute, and deny all assistance, set aside every security and instrument whatever, infected with usury.

The court, therefore, erred in decreeing the payment of six per cent. interest, and for this error the decree must be reversed. The costs of the additional abstract are to be taxed against the appellant.

Decree reversed.

OLIVER W. LULL *et al.*
v.
LUTHER STONE.

1. CONTRACT—*to convey land—warranty.* Where the vendor of land, having only an inchoate title, agrees in his contract of sale to convey "all his right, title and interest, with full covenants of warranty," he is at least bound to keep good and convey such estate as he had at the time of making sale. He can neither convey it to another, nor forfeit it by his own *laches* without discharging his vendee from all obligation to accept and pay for a barren deed.

2. SAME. A, having purchased land from the owner, but not having completed the payment of the purchase money or obtained a deed, sold the same to B, and stipulated in the contract of sale that he would convey his right,
[*225] title and interest with full covenants of warranty, on the payment by B, of the notes given by him to A, for the purchase money. There was no default of payment on the part of B, but A, failing to make his own payments to the holder of the legal title, the latter declared a forfeiture of A's contract, and re-sold the land to B, who then refused to pay the notes given by him to A. The assignee of the unpaid notes brought suit: *Held*, that the foregoing facts constituted a good defense against the holder of the notes, unless he stood in the position of an innocent assignee for a valuable consideration.

WRIT OF ERROR to the Superior Court of Chicago; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action of assumpsit brought at the September

term, 1862, by the plaintiffs in error against the defendants in error upon certain promissory notes. The plaintiffs recovered verdict and judgment for only a part of the sum claimed, and sued out a writ of error. The facts appear in the opinion of the court.

Mr. W. T. BURGESS for plaintiffs in error.

This case turns wholly upon the proper construction of a contract where, after reciting a sale of land for a sum of money in installments, the party, who at the time holds a mere equity, agrees on the payment of the last installment to convey by deed all his right, title and interest in the land with full covenants of warranty.

1. Such a deed simply extends to his interest whatever it may be. *Sweet* v. *Brown*, 12 Metcalf, 175; *Allen* v. *Holton*, 20 Pick., 464; *Blanchard* v. *Brooks*, 12 Ib., 66; *Browning* v. *Wright*, 2 Bos. & Pul., 23; *Snell* v. *Young*, 3 Iredell, Law, 379; *Roberts* v. *Forsyth*, 3 Dev., 26.

2. And it was sufficient that Prussing at the time of the contract had some interest which he had not defeated by any act done by him. *Johnson* v. *Tool*, 1 Dana, 479; *Parker and Wife* v. *Perkins*, 8 Cushing, 318; *Crawford* v. *Murphy*, 22 Pa. State Rep., 87, citing 5 Watts & Serg., 51.

Messrs. ARRINGTON & DENT, for defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the court: [*226]

The plaintiffs in error have assigned as error:—1st, The sustaining of the demurrer to the third replication. 2d, The erroneous construction given by the court to the contract between Prussing and Stone. 3d, The refusal of the court to give the 7th and 8th instructions asked by the plaintiffs, and 4th, The refusal of a new trial. The counsel adds, however, to his assignment of error, that he seeks only to raise the question of the proper construction of the Stone and Prussing contract, and it is to that point that the argument has been directed. We shall not therefore consider either the pleadings or the instructions, it being conceded that the verdict and judgment are right, on that construction of the contract which we are of opinion must be given to it.

On the 23d of April, 1856, one Prussing sold to Stone, the defendant below, a lot of land in the city of Chicago for $4,620, of which sum Stone paid $1,200 in hand, and gave to Prussing his three promissory notes for the residue, one for $1,372.72, payable May 1, 1857, one for $1,302.93, payable May 1, 1858, and one for $1,233.11, payable May 1, 1859. Prussing, at the same time, executed to Stone a contract reciting the sale of the land, and agreeing, on the payment of the notes, to execute to Stone a deed

"of all the right, title, and interest of the party of the first part, of, in and to the above described premises, with the appurtenances, with full covenants of warranty."

At the time of this sale from Prussing to Stone, the former held the lot under contract of purchase from Mrs. Clark, bearing date October 15, 1855, by the terms of which contract Prussing had bought the property for $3,000, and had paid $750 in hand, and executed to Mrs. Clark, his three notes for $750 each, payable respectively in one, two and three years from their date. The contract further provided, that in case of default in the payment of any installment for sixty days after it became due, Mrs. Clark might declare the contract forfeited. Acting under this [*227] clause, Mrs. Clark had declared a forfeiture on the 15th of December, 1857, for non-payment of the note due in October, 1857. When this forfeiture was thus declared, Stone was in no default to Prussing on his contract of purchase, having duly paid his note that matured May 1, 1857. The day after the forfeiture was thus declared, Stone, having already paid to Prussing, $2,572.72, besides the interest, and Prussing's title being now lost, bought the lot from Mrs. Clark, having been notified by her agent that it was again in the market. By his contract with her, he was to pay her the amount still unpaid on his own contract with Prussing, and he paid her in hand the amount then due her on her contract with Prussing, and executed his notes for the remainder. But before this occurred, Prussing had assigned to the plaintiffs, Lull and Mayer, the two unpaid notes of Stone, as collateral security for a debt due them, the notes being not yet due. When they matured, Stone refused to pay them, and Lull & Mayer brought this suit to recover the amount of both notes. Stone, in various pleas, set up the foregoing facts as a defense, and the court below held it good, except as to the amount of the debt due Lull & Mayer from Prussing, for which amount he allowed a recovery, treating the plaintiffs as, to that extent, innocent indorsees for a valuable consideration. Lull & Mayer bring the record here, insisting that they are entitled to recover the full amount of the notes.

The counsel for the plaintiffs in error insists that by the peculiar provisions of the contract between Stone and Prussing, the latter was only to convey his "right, title and interest" in the lot, and that the "full covenants of warranty" which the contract provided the deed was to contain, would apply only to such right, title and interest, and hence, that the fact that Prussing had no title when the time for his conveyance arrived, would be no breach of the covenants to be contained in the deed, and did not make a failure of consideration. In support of this position he cites the cases of *Sweet* v. *Brown*, 12 Met., 175; *Allen* v. *Holton*,

20 Pick., 464; *Blanchard* v. *Banks*, 12 Pick., 66; *Snell* [*228] v. *Spring*, 3 Iredell Law Rep., 379, and *Roberts* v. *Forsyth*, 3 Dev., 26.

It is true that some of these cases explicitly hold that, where a deed conveys only the grantor's right, title and interest, the subsequent covenants in the deed, even though full covenants of warranty, are to be considered as having reference merely to the right and title of the grantor, whatever these may be, and hence that the fact that he has no title at the date of the conveyance, is no breach of the warranty. It is difficult to see, if this be the true construction of such deeds, with what view the covenants were inserted, unless to deceive the grantee with the idea that he was getting covenants upon which he could safely repose for the security of his title, but which a narrow and technical construction would render utterly nugatory, on the day of trial, keeping the word of promise to the ear, but breaking it to the hope. But even conceding that the cases which thus hold, are a true exposition of the law, the case at bar is not within them.

When Prussing sold to Stone, he had an inchoate title to the land under his contract with Mrs. Clark. Giving, then, to his contract the most rigid and technical construction in his power, which would be against all rules for construing contracts, and it still must be conceded that he bound himself by it to make a conveyance which should pass the estate he held in the premises at the date of the sale, and that the covenants to be inserted in the deed should be construed as at least applying to such estate. Such interest as he had when he sold, he would at least be bound to keep good and to convey. He could neither deed it to another, nor forfeit it by his own *laches*, without discharging his vendee from any obligation to accept and pay for a barren deed. It certainly cannot be contended that, if A, owning land, sells it to B, the purchase money payable one-half down, and the remainder at the end of a year, and binds himself, on the last payment, to convey merely by deed without covenants, he can, before the year expires, convey the land to a third person, and still insist that by tendering a deed, which would pass no title to the [*229] first purchaser, he could demand and collect the unpaid purchase money. To allow this would be literally offering a premium to fraud.

There is no substantial difference between this hypothetical case and the one at bar, except so far as such difference is in favor of the defendant. It is true, in the case before us, the vendor did not lose his title by the affirmative act of conveyance to a third person, but he lost it by his *laches*, by his failure to do what he had bound himself to do, and what the purchaser had a right to expect would be done, as he must have bought upon the faith that

the vendor would perform his contract, and thereby perfect his inchoate title. But in one respect the case at bar is stronger against the vendor, inasmuch as Prussing bound himself to convey by a deed with full covenants, and, as we have already said, these covenants must be considered as at least applying to such estate as Prussing had at the time of his sale. It matters not, then, whether we consider the absolute title to the land, or the agreement to convey, with covenants, such estate as he had at the time of sale, as forming the consideration of the notes; in either case the consideration has wholly failed. If Stone were in default, perhaps a different question might be presented, but it must be observed that he is in none. He paid his second note at its maturity, and, before the third fell due, Prussing had lost his title. The latter then cannot say that his own *laches* arose from any default on the part of Stone. It is with exceeding ill grace that he now insists that Stone shall pay in full, for what he had bought but never received. The plain dictates of justice are here in accord with the strict rules of law.

Judgment affirmed.

Mr. JUSTICE BREESE dissenting.

[*230] R. CYRUS CABEEN
v.
JOHN MULLIGAN.

1. HOMESTEAD — *abandonment.* When the husband, being the head of a family, and residing with them, removes to another State, with his family, and remains there for two years before he returns, and declares that he expects to remain when he leaves, and after his return that he expected when he left to remain, but it was to his interest to return; his homestead thereby becomes liable to sale on execution.

2. POSSESSION OF HOMESTEAD. Whilst in case of the death of a husband, or of both parents, and the children are of tender years, possession by a tenant may protect the property from sale on execution, yet when the husband is living, the family must reside upon the homestead.

3. RESIDENCE IN ANOTHER STATE. A debtor, who removes with his family to another State, and remains there for two years, may be regarded as having abandoned his homestead, without reference to what he may say before or after his return; by thus leaving he ceased to occupy the homestead, and it becomes liable to sale under execution.

WRIT OF ERROR to the Circuit Court of Mercer county; the Hon. CHARLES B. LAWRENCE, Judge presiding.

This was a suit in chancery, commenced in the Mercer Circuit Court, to the April term, 1862, by R. C. Cabeen, against John Mulligan. The object of the bill was to set aside a sale and deed made by the sheriff to defendant, of a house and lot of ground, sold under execution, which is claimed to have been exempt from sale, under the homestead exemption law.

The bill alleges, that complainant, on the 12th day of September, 1859, was the owner in fee, and possessed of the S. ½ of lot 9, in block 4, in the town of Keithsburg, Mercer county, Illinois; and on that day Norton, Jewett & Busby, obtained a judgment against complainant in the Circuit Court, for $676.51, on which an execution was issued on the 10th day of November following, which was placed in the hands of the sheriff, who levied it upon the lot, and sold the same to plaintiffs in the execution.

That afterwards, on the 14th day of December, 1858, [*231] defendant Mulligan, recovered a judgment, before a justice of the peace, against complainant, for the sum of $93.75, and costs of suit; that on the eighth day of February, 1859, he filed a transcript thereof, in the office of the clerk of the Circuit Court, and on the following day, an execution was issued and placed in the hands of the sheriff; and under which Mulligan redeemed the lot, from the previous sale of Norton, Jewett & Busby, and it was levied upon under Mulligan's execution and sold to him, on the 29th of March, 1859, for $114.14; and on the 6th day of the following April, the sheriff made him a deed.

That these debts were created after the 4th day of July, 1851; that when the judgment was rendered in favor of Norton, Jewett & Busby, complainant was the head of a family, residing with them upon the lot, and so continued, until after the sale by them; that during that time, he had a wife and children; that there was a dwelling house on the lot, erected and occupied by him as a homestead, and that he did not relinquish his right of homestead to any person; that when Mulligan purchased, he was not residing on the lot; but was still the head of a family, residing with them; that he left the premises temporarily, intending to return, and after an absence of two years, he did return, and occupied the premises with his family.

That when he left the premises, he leased them to a tenant for one year, with the privilege of three, and the tenant occupied them about one year, and then delivered them to complainant; that the house and lot, is not worth more than one thousand dollars; that the debts were not contracted for the purchase or improvement of the lot.

The bill was afterwards amended. And by the amended bill, the same facts were alleged, and that complainant left the premises on the first day of June, 1857, and returned after a lapse of about two years, and has occupied the premises with his family ever since.

Defendant filed an answer to the bill, by which he [*232] admitted its material allegations. He, however, alleged that complainant was indebted to him in the sum of $1,100, for money loaned and goods sold to him, prior to the 4th of July,

1851, and on the 1st of December, 1856, he executed to defendant two promissory notes, payable in one and two years from that date, and executed a mortgage upon the premises described in the bill, to secure the payment of the same. A replication was filed, and the cause was heard, at the same term, on bill, answer, replication and proofs. It was agreed that the following was all the proof heard in the case:

"That Cabeen left about the first of June, 1857; that he owned the premises in fee in controversy; that he erected a dwelling-house on the premises; that he was the head of a family and residing on the premises to the time he left; that he leased said premises to one Edward Hazleton for one year, with the privilege of three years; that he assigned said lease to Thomas B. Cabeen when he left; that Cabeen then moved to Stockton, in the State of Minnesota, with his family, at the instance of James Stockton, who represented that he had a hotel there and that he wanted Cabeen to come up and keep the same for him; that he moved to said place, stating before he went that if he liked and could do well he would stay, but that if he could not, he intended to return. He remained in Minnesota about two years, and returned; that during the whole time of his absence the premises were occupied by said Hazleton as his tenant, and until about three months after the return of said Cabeen, and before the termination of said lease the said Cabeen took possession of said premises with his family, and resided in the same on said premises during the whole time up to the present time. That Thomas B. Cabeen, during the time, received the rents and profits of said premises and applied them to the payment of complainant's indebtedness, during the time, the same was so leased; that was all the real estate said Cabeen had in the State at the time; that said
[*233] Cabeen did keep said hotel in said Stockton, as he intended to do; that after the return of said complainant, he said that when he left he expected to remain in Minnesota — he had expected to do well there, but that he afterwards found it to his interest to return to Keithsburg."

The court dismissed the bill, and rendered a decree against complainant for costs; to reverse which the case is brought to this court; and the following errors are assigned:

1. The decree should have been for complainant.
2. The court erred in rendering a decree for defendant.
3. In rendering a decree for costs against complainant, and
4. In not granting the prayer of the bill.

Mr. H. M. WEED for plaintiff in error:

1. The object and purposes of the homestead act are so to protect the homestead as to shield it from the claims of creditors, and

from the improvidence of the husband, for the benefit of the wife and children. This law is remedial in its nature, and must be so construed as most effectually to accomplish the ends in view. *Pardee* v. *Lindley*, 31 Ill., 174; *Deere* v. *Chapman*, 25 Ill., 610.

2. Actual residence on the property is not always indispensable in order to preserve the rights given by the homestead act. Within the meaning of the law, a person may have actual possession, actual occupation, without residence. The occupation may be preserved for the benefit of the family by a tenant, or by the storage of the household furniture, etc., for a period. If the citizen or family should leave, in search of another house, even though they should go to a distant State for that purpose, and being disappointed, should return to their former house, they would not thereby lose their rights under the homestead act. *Walters* v. *The People*, 18 Ill., 194; *Walters* v. *The People*, 21 Ill., 178; *Kitchell* v. *Burgwin*, 21 Ill., 40; *Vanzant* v. *Vanzant*, 23 Ill., 536.

3. So long as one has his domicil in this State he can [*234] avail himself of the provisions of the homestead act. Cabeen did not lose his domicil here by his absence in Minnesota. The change of domicil must be determined by the intention of the party, and in this case the evidence is not sufficient to establish any such intention on the part of Cabeen. To prove a change of domicil it must be made to appear, not only that the old domicil has been abandoned, but also that a new one has been acquired; so that a domicil being once fixed, will continue, notwithstanding the absence of the party, until there is a substitution of a new one. The intention to abandon a domicil and actual residence at another place, if not accompanied with the intention of remaining there permanently, or at least for an indefinite time, will not produce a change of domicil. 10 Pick., 77; 1 Met., 250; Story on Conflict of Laws, Ch., III.

4. The right to the homestead is a right cast upon the wife for her benefit, and the benefit of her children, of which she and they cannot be deprived in any other way than that prescribed by the act itself. The abandonment of the homestead by a widowed mother would not prejudice the rights of her children; would the abandonment by the husband prejudice the rights of the wife? This right of homestead on the part of the wife and her children, is equally inviolate, in spite of creditors or husband, as her right to the separate property which she may own in fee, or her right to dower in her husband's estate. The husband cannot compel the wife to release her rights under the homestead act; can he, by compelling her and her children to abandon the homestead, deprive her of these rights? Can he thus accomplish indi-

rectly what the law will not allow him to do directly? Can her rights under this law be taken away, except by a release or waiver executed of her own free will, or by an abandonment of one homestead and the acquiring of another? Suppose Cabeen had died the moment he reached Minnesota, could not his wife and children have returned to Keithsburg and held the homestead? Or,
[*235] suppose husband and wife both died there, could not the children claim the homestead? If not, how were they to live? *Walters* v. *The People*, 21 Ill., 178; *Pardee* v. *Lindley*, 31 Ill., 174.

Messrs. J. R. & J. N. BASSETT for defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

This record presents a question of fact for determination. It is, whether plaintiff in error abandoned his homestead, so that a judgment previously recovered, and under which a sale had been made, and a transcript of a judgment before a justice of the peace, became valid liens upon the homestead. Up to the time plaintiff in error moved to Minnesota, the premises were undoubtedly protected from sale under execution, by the operation of the homestead law. But he left his home, and removed with his family to Minnesota, and with them, resided there for two years. He stated before leaving the State, that if he liked the country, and could do well in his business, he would remain, but if not, he would return. And after he came back to his former residence, he stated that when he left, he expected to remain in Minnesota, but found it to his interest to return to Keithsburg. From these statements, it is manifest that he left with the design of remaining, and of abandoning his former home. He says he expected to remain in Minnesota.

Whilst this court has held that an actual residence is not, under all circumstances, essential, yet, as a general rule, it is requisite, to protect the homestead from sale on execution. To carry out the object of that Statute, it may become necessary, when the husband is dead, and especially so, when both parents have died, and the children, entitled to the benefit of the law, are of tender years, that a residence by a tenant may be substituted for an actual occupancy by the widow or the children. But it is only in such cases, and under peculiar circumstances, that the actual residence of the person claiming the benefit of the act can be dispensed with.
[*236] This was the rule announced in substance in *Walters v. The People*, 21 Ill., 178, and *Kitchell* v. *Burgwin*, 21 Ill., 40. It was, however, said that we could lay down no rule to govern such cases, but each case must depend upon its own pecu-

liar circumstances, so that among them no evidence shall be found of an abandonment of the husband and family.

In this case, we think that a removal by himself and family, for the period of two years, to another State, and ceasing to occupy the premises, was evidence of an abandonment by the owner of his right to claim the homestead. This, we think, is true, without reference to what he said before or after his return. That could not change the question, of whether he had ceased to reside upon the place. His intention may have been a material question, as to whether he had ceased to be a resident of the State, but could not operate upon the question of whether he had ceased to occupy his homestead. If he might remove his family and effects to another State, and remain there with them for two years, and still claim his former residence as exempt from sale under the homestead law, we are at a loss to conceive how long an abandonment it would require to subject it to the payment of his debts. To permit such an abandonment, without rendering the property liable to forced sale, would be to enable debtors to perpetrate frauds upon their creditors that could not have been designed by the general assembly when the act was adopted.

The judgment of the court below must be affirmed.

Judgment affirmed.

Mr. JUSTICE LAWRENCE, having tried the cause in the court below, took no part in this decision.

CHARLES CHINIQUY [*237]

v.

LOUIS DELIERE.

1. ASSUMPSIT—*parish priest—church warden.* An action of assumpsit will not lie by a church warden, for services as such, against the priest of the parish, in a case where such church warden was appointed by the trustees of the church.

APPEAL from the Circuit Court of Kankakee county; the Hon. CHARLES R. STARR, Judge, presiding.

This was an action of assumpsit in the Kankakee Circuit Court, by Louis Deliere against Charles Chiniquy, and verdict and judgment for the plaintiff. The case is brought here by the defendant, by appeal and the following errors assigned:

1. In giving the plaintiff's intentions.

2. In refusing to grant a new trial, and in giving judgment on the verdict.

The facts are sufficiently stated in the opinion of the court.

Mr. STEPHEN R. MOORE for appellant.

Mr. C. A. LAKE for appellee.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was an action of assumpsit in the Kankakee Circuit Court, brought by appellee against appellant, and a judgment obtained against appellant for three hundred and thirty-six dollars.

The declaration counted on an imaginary or supposed promissory note for four hundred dollars, executed by appellant [*238] to appellee, but no note was produced or shown, the real ground of controversy being a claim for services set up by appellee against the appellant.

It appears that appellant was the pastor of the Church of St. Ann, composed of emigrants from Canada, and that during his absence in Europe, the trustees of the church employed appellee to officiate as warden thereof, and he was regularly installed into office, and put, with his family, into possession of three rooms in the basement of the church, where he continued to reside for about four years. His services, it appears, were not very onerous, consisting chiefly in ringing the church bell three times a day to notify the people of the time to go to work in the morning—to refresh themselves at noon—and to cease labor in the evening, and sometimes to carry to the priest a glass of water and light his candles, and to keep the church clean, and light it up when required. All these duties employed appellee, perhaps, one hour each day, and his spare time was employed in the priest's garden and on his farm, for which he was fully paid by the appellant.

It also appears, that as part compensation to appellee, the parishioners were in the habit of bringing him flour, wood, soap and other necessaries for his family, and the priest himself, the appellant, sent him, as a present, from England, one hundred dollars.

The whole weight of the evidence goes to show, most clearly, that appellant was under no liability whatever, by any promise, express or implied, to pay appellee for his services as church warden. It also shows that appellee was not employed as church warden by appellant, but by the trustees, and the whole case is barren of one single fact calculated to fix a responsibility upon the appellant. And why the appellant's counsel should have put in a plea of set-off, in such a case, we cannot understand, nor can we understand why the jury found the verdict they did, under the proof.

They must have been misled by the instructions, several of which were calculated to mislead, and throw the jury off the true path of inquiry. The question before them was, a

hiring and employment by appellant to perform the services [*239] of church warden. Not one of the instructions asked by appellee, and given, point in that direction.

The instructions asked by the defendant take this view of the case, and it is unaccountable, as they were all given by the court, that the jury came to the conclusion they did.

There is no evidence to support the verdict. The remark of appellant, that he was so destitute, "he could not pay his poor church warden," fixes no liability on him to pay the warden, he having been employed by the trustees, and performed no services for the personal benefit of appellant, for which he was not fully paid. The court should have granted a new trial. For refusing to do so, the judgment is reversed and the cause remanded, that a *venire de novo* may issue.

Judgment reversed.

GROSVENOR *et al.*
v.
MAGILL & LATHAM.

1. TIME—*fraction of a day.* While, for many purposes the law knows no division of a day, yet whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into the fractions of a day as readily as into the fractions of any other unit of time.

2. SAME. When parties contract for the performance of an act during the first half of any month containing thirty-one days, they contract that it shall be performed by noon of the sixteenth day.

3. PLEADING—*proof under bad declaration.* A bad declaration does not necessarily entitle a party to recover on insufficient evidence.

4. SAME. Where it is incumbent on the plaintiff to aver, in his declaration, performance of certain terms in a contract, and he avers a performance in terms susceptible of an equivocal construction, the defendant may demur, but he is not obliged to do so. He may plead the general issue, treating the averment of performance as such an averment as the nature of the contract required the plaintiff to make, and on the trial, may insist that the plaintiff shall prove such performance as the contract required.

WRIT OF ERROR to the Superior Court of Chicago. [*240]

This was an action on the case brought by Grosvenor & Co., against Magill & Latham. In the court below, the verdict and judgment were for the defendant. The facts appear in the opinion of the court.

Messrs. WALKER, STEARNS & COPELAND for plaintiffs in error.

Mr. F. PULVER for defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

This was an action on the case brought by Grosvenor & Co., against Magill & Latham, on the following contract:

CHICAGO, *July* 9, 1864.

Bought of Grosvenor & Co., 2,500 barrels Michigan No. 1 fine salt, at $3.40 per barrel, afloat, seller's option, first half of August next; salt to be new, and in good barrels, payable on delivery at Chicago.

MAGILL & LATHAM.

On the trial, the plaintiffs proved an offer to deliver the salt at a quarter before one o'clock, P. M., on the 16th of August; that it was worth $3.25 per barrel, afloat, and that the defendants refused to receive it. The plaintiffs asked the court to instruct the jury as follows:

"The law knows no division of a day, and where a party contracts to deliver goods by the first half of August, and offers to deliver them at a reasonable hour on the 16th day of August, such offer is in time, and is a sufficient compliance with the contract."

The court refused to give this instruction, and this refusal is assigned for error.

It is true that for many purposes the law knows no division of a day, but whenever it becomes important to the ends [*241] of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day as readily as into the fractions of any other unit of time. 2 Black. Com., 140, notes. The rule is purely one of convenience, which must give way whenever the rights of parties require it. There is no indivisible unity about a day which forbids us, in legal proceedings, to consider its component hours, any more than about a month which restrains us from regarding its constituent days. The law is not made of such unreasonable and arbitrary rules.

In the case at bar, the parties, by their own contract, have divided the day, by equally dividing a certain month that has an odd number of days. What reason is there for attaching the 16th day of August to the first half of the month rather than to the last? None can be given, and if attached to the last half, the vender of the salt would have been obliged to deliver on the 15th. The first half of the month of August undeniably ends at noon on the sixteenth day, and when parties contract for the performance of an act during the first half of the month, they contract that it shall be performed by noon of the sixteenth day. These parties, by their own agreement, divided the day, and thus compel the court to divide it in order to adjust their rights.

The counsel for plaintiff in error further insist that there was a waiver by the defendants of the delivery of the salt according to the terms of the contract. The only evidence in regard to this is, that one of the defendants, being told on the 15th by

plaintiffs' clerk that the salt had not arrived, and asked what should be done in case the vessel having it on board should not arrive that day, replied that the time for the delivery had not expired, and would not until next day, and that they were bound to receive and would receive the salt on the next day. This statement was perfectly consistent with the contract, and was, therefore, no waiver of its terms. The defendants were bound to receive the salt on the next day, by their contract, but only until noon, and when the defendants stated that they [*242] were bound to and would receive it on the next day, we have no right to presume that they had reference to anything more than the first half of the day. They spoke of their *obligation* to receive it, and that obligation terminated at noon.

The counsel for plaintiff in error further urge that in their declaration they only averred an offer to deliver on the 16th of August, and that if such averment was not good under the contract, the defendants should have demurred, but having pleaded the general issue, the plaintiffs were only obliged to prove their case as they laid it. This is an error. A bad declaration does not necessarily entitle a plaintiff to recover upon insufficient evidence. Where it is incumbent upon the plaintiff to aver, in his declaration, performance of certain terms in a contract, and he avers a performance in terms susceptible of an equivocal construction, the defendant may demur, but he is not obliged to do so. He may, as in this case, plead the general issue, treating the averment of performance as such an averment as the nature of the contract required the plaintiff to make, and on the trial may insist that the plaintiff shall prove such performance as his contract required. In the case at bar, the defendant had a right to consider the averment of a tender of the salt on the 16th of August, in connection with the contract set out in the declaration, as being an averment of such a tender on the 16th as was required by the contract, to wit, a tender by noon, and to insist on such proof. The averment, in fact, was not sufficiently definite, and a demurrer would have been sustained, but by this defective averment the plaintiff did not acquire a right to a verdict upon evidence that showed his claim against the defendants to be without foundation.

Judgment affirmed.

[*243] WILLIAM A. P. BLANCHARD and WILLIAM MCLAREN

v.

THOMAS PRATT.

1. INSTRUCTIONS—*forcible entry and detainer.* An instruction, which, by its terms, cuts off all consideration of an actual adverse possession in the opposite party is erroneous.

2. *As to color of title.* It is objectionable in an instruction, if it fails to define what is color of title, that being a question of law.

3. SAME—*as to legal possession.* An instruction on the question of legal possession is objectionable, if it leaves it to the jury to say what is a legal possession, for that is a question of law.

4. EVIDENCE—*witness swearing falsely.* It is error to tell the jury if a witness has sworn falsely in one particular, his whole testimony must be rejected, for he may, in other portions of his testimony, be corroborated.

5. Where it appears, from the record, that improper instructions have been given, and that justice had not been done, the judgment will be reversed.

APPEAL from the Circuit Court of Bureau county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

This was an action of forcible entry and detainer, brought by Thomas Pratt, before a justice of the peace of Bureau county, against William A. P. Blanchard and William McLaren. The forcible entry was charged to have been on the southwest quarter of section twenty-six, in town fifteen north, range six, east of the fourth principal meridian, in the county of Bureau. A verdict was found for Pratt, and a judgment of restitution awarded, from which Blanchard and McLaren appealed to the Circuit Court.

On the trial in that court, the same judgment was rendered, from which, this appeal is taken, and various errors assigned. It is not deemed necessary to notice any of the errors assigned, except those considered by the court, and they were the errors assigned on the instructions. For this same reason, the facts of the case are not stated.

The instructions given for the plaintiff, and to which the defendants excepted, were as follows:

[*244] 2. Although the jury should believe, from the evidence, that Blanchard and McLaren, the defendants, or one of them, broke up a portion of ground on the land in dispute in the spring of 1861, for the purpose of taking possession, claiming the whole in such public manner as to apprise the neighborhood of such facts, if the jury believe, from the evidence, that at the time they so took such possession, they had no color of title to the tract of land in dispute, then their possession is confined in law to the quantity of ground so broken up.

9. If the jury believe, from the evidence, that at the time of the breaking by Pratt, he had a lease or paper title to the entire

quarter section in dispute, and he did such breaking under such lease or paper title with the intention of taking possession of the entire tract, and claimed title to the entire tract, such breaking extended his possession to all the land embraced in the lease or paper title.

13. If the jury find, from the evidence, that Pratt took actual possession, by breaking of part of the land in dispute, claiming the whole under a lease, and that afterwards, while he was so in possession, Blanchard and McLaren entered upon the land, by moving a house upon it, and breaking or fencing it against Pratt's consent, wrongfully and without right, and that Pratt's possession was prior to any legal possession of the defendants, they should find for the plaintiff.

19. If the jury believe, from the evidence, that any witness has sworn willfully, knowingly and falsely to any material point, they are warranted in entirely discrediting his whole testimony.

Mr. MILO KENDALL and Mr. GEORGE O. IDE for appellants.

Mr. T. G. FROST for appellee.

Mr. JUSTICE BREESE delivered the opinion of the court:

The points on this record arise out of the instructions [*245] given by the court, on behalf of the plaintiff, the appellee here, and which were accepted to at the time by appellants. They are twenty-one in number, the most of which we deem pertinent and relative to the case on trial, and based on the evidence adduced. Some of them are objectionable, which we will notice.

The ninth instruction for the appellee is as follows:

"If the jury believe, from the evidence, that at the time of the breaking by Pratt, he had a lease or paper title to the entire quarter section in dispute, and he did such breaking under such lease or paper title with the intention of taking possession of the entire tract, and claimed title to the entire tract, such breaking extended his possession to all the land embraced in the lease or paper title."

In the terms given, this instruction cuts off all consideration of an actual adverse possession of defendants, and is therefore wrong. Had there been no actual possession set up by the defendants, it would be well enough, but there being evidence tending to show such possession, the instruction should have been framed to save it; as given, it was too broad.

The second instruction is also objectionable, in not defining what color of title is. It does not rest with the jury to say what is or what is not color of title, it is for the court to say what is color of title.

The thirteenth instruction is also objectionable. It is this:

"If the jury find, from the evidence, that Pratt took actual possession by breaking part of the land in dispute, claiming the whole under a lease, and that afterwards while he was so in possession, Blanchard and McLaren entered upon the land by moving a house upon it, and breaking or fencing it against Pratt's consent, wrongfully and without right, and that Pratt's possession was prior to any legal possession of the defendants, they should find for the plaintiff."

[*246] The reason given in support of the objection to the second instruction applies equally to this. It leaves it to the jury to say what constitutes a legal possession. That is purely a question of law on facts proved. It is for the court, not the jury, to say what is a "legal possession."

The nineteenth instruction should have been qualified. It is as follows:

"If the jury believe, from the evidence, that any witness has sworn willfully, knowingly and falsely to any material point, they are warranted in entirely discrediting his whole testimony."

We do not understand this to be the rule of evidence, laid down, as it is, so unqualifiedly. A witness may swear falsely as to one important fact, but in regard to other facts, he may be corroborated by the testimony of other witnesses. In such case, the jury would not be justified in discarding his whole testimony; therefore, the court should have added the words, "unless corroborated." As given, it is not the law, and was calculated to affect injuriously the defendant's case. But whether that would be the effect or not, it should have been qualified by the words suggested. *Crabtree* v. *Hagenbaugh*, 25 Ill., 240.

This court has frequently said, a judgment would not be reversed merely on the ground that improper instructions had been given, if, upon the whole record, it appeared substantial justice had been done, and this rule would govern in this case. A careful inspection of the whole record, however, does not satisfy us that such has been the result, but think the purposes of justice will be best subserved by sending the cause to another jury. For that purpose, the judgment is reversed and the cause remanded.

Judgment reversed.

[*247] FRANKLIN ELIJAH

v.

SAMUEL C. TAYLOR.

HUSBAND AND WIFE—*property of latter under law of* 1861. Where the husband, as the head of the family, occupies and cultivates the land of the wife, he must be considered as occupying it, with her consent, for the common benefit

of the family; and the products of his toil, upon such land, are as much his property, notwithstanding the act of 1861, as if he had occupied, as a tenant, land rented from some third person.

WRIT OF ERROR to the Circuit Court of Iroquois county; the Hon. CHARLES R. STARR, Judge, presiding.

This was a suit originally commenced by Samuel C. Taylor against Franklin Elijah before a justice of the peace to recover the value of certain corn.

On an appeal to the Circuit Court and trial there, the plaintiff recovered a verdict and judgment for $53.00, whereupon Elijah sued out a writ of error. The facts are stated in the opinion.

Messrs. FLETCHER & KINNEY for plaintiff in error:

The first point raised in this cause is, that the land upon which the said corn was raised, and also the corn itself, was the property of Mrs. Taylor, and not the property of Samuel C. Taylor. The statute of his State, passed in 1861, approved February 21st, 1861, on page 143 Session Laws of 1861, was passed for the express purpose of meeting such a case as this, and to prevent the husband from taking and appropriating the property of the wife for the benefit of himself.

The husband, under said statute, cannot control or interfere with the separate property of the wife. She, under said law, is the complete, entire and absolute owner of her own property. And the husband cannot, in his own name, sue for or in any manner control her property, and she, for the purpose of [*248] controlling her own property, is, by said law, for such purpose, a *feme sole:* she is to all intents and for all purposes, respecting said property, separate from her husband.

In *Emerson* v. *Clayton*, 32 Ill., 493, the true construction is given to the said statute above referred to.

Therefore we hold it to be true, if Mrs. Taylor was the owner of the land on which said corn was raised, and that she sold said corn under a contract made between her and the said Elijah, and afterwards her husband interfered with the transaction between his wife and said Elijah, the said Taylor cannot afterwards, in his own name, sue and recover, but if he sues, his suit must be dismissed, because he has no interest in the subject matter of the suit; and the legal title in said corn was the property of Mrs Taylor and not the property of Samuel C. Taylor. 1 Chitty's Pleadings, 10th American edition, page 2, title, Parties.

Messrs. BLADES & KAY for defendant in error.

The position taken by the defendant in the Circuit Court is radical in the extreme, and if sanctioned by the court, would subvert the natural domestic relations, so far as the "rights of

things" are concerned, and in every case where the husband and wife live on the land of the wife, the husband would be obliged to regularly lease the land of the wife, else he would be taken to be her servant.

As the law now stands, without any forced construction, the property of the wife is hers absolutely. She can, it seems, convey her lands by her sole and separate deed.

The wife's interest in the realty of her husband is such an incumbrance as to prevent the husband from conveying *his* lands without her legal consent, even lands which constitute no part of the homestead. The wife hangs like a perpetual cloud upon the title of the husband. *His* property is liable for debts contracted by *her* for necessaries. She takes a large share of his property upon his death, while her property goes to *her* heirs, and [*249] is, we suppose, in no case liable for debts contracted by him for necessaries for the family. She is the *baron;* he is the *feme.* The Utopia of woman's rights has been reached. We cite, *Peck* v. *Ward*, 6 Haris, 506; *Thorndell* v. *Morrison*, 1 Casey, 326; *Ulp* v. *Campbell*, 7 Harris, 361; *Stoops* v. *Blackford*, 3 Casey, 214; *Steinman* v. *Ewing*, 7 Wright, 63; *Mahon* v. *Gormley*, 12 Harris, 80; *Raybold* v. *Raybold*, 8 Harris, 308; *Kenedy* v. *Good*, 9 Harris, 349.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

The plaintiff below, Taylor, occupied with his wife in the spring and summer of 1862, a piece of land owned by her, on which he planted corn. In the course of the summer he went into the army, leaving his wife in charge of his affairs. She sold the standing corn to the appellant, Elijah, at 20 cents per bushel, for which he gave her his note, estimating the corn at 400 bushels, and agreeing to pay her at the same rate for any surplus. She went on a journey, leaving him to gather and measure the corn, and on her return he paid her for 425 bushels, she insisting, however, that there was a larger quantity. Her husband, on his return from the army, brought suit for the alleged surplus, and obtained a verdict and judgment for $53.

It is insisted, as a ground for reversing the judgment, that, admitting there was a surplus of corn unpaid for, the husband cannot maintain the suit—that the act of 1861, in regard to the property of married women, made the wife of the plaintiff the sole owner of the corn, because it was raised on her land, and that the husband had no legal interest in it.

We desire to proceed cautiously in the construction of that act, because, although passed without much consideration, it involves interests of great magnitude, and questions of no little difficulty. All that we deem it necessary to say, in regard to the case before

us, is this: that where the husband, as the head of the family, occupies and cultivates the land of the wife, he must be considered as occupying it with her consent, for the common benefit of the family; and the products of his toil upon [*250] such land, are as much his property, notwithstanding the act of 1861, as if he had occupied, as a tenant, land rented from some third person. Any other rule would plainly lead to great confusion, and open a wide door to fraud. In the case at bar, the corn was planted, and at least partially raised, by the husband, and must be regarded as his property. The question as to whether there was really more corn than the 425 bushels for which Elijah accounted, is left in some doubt by the evidence, but it is a question which the jury were quite competent to decide, and we cannot say that the evidence does not sustain the verdict. Indeed we think the preponderance of evidence is in its favor.

Judgment affirmed.

CURTIS N. BENNETT
v.
MICHAEL O'BRIEN.

1. BAILMENT —*what is gratuitous.* He who borrows the horse of another for use, without compensation, is a gratuitous bailee.
2. SAME. The loan of the use of domestic animals necessarily involves their keeping, and the expense thus incurred by the borrower is not a compensation to the lender which changes the gratuitous character of the bailment.
3. SAME—*burthen of proof.* In a suit brought by the lender against the borrower of a horse, which died in the possession of the latter, after the plaintiff proved the character of the bailment and the death of the horse in the bailee's hands, it devolved on the latter to show he had exercised the degree of care required by the nature of the bailment.
4. SAME. A gratuitous bailee must exercise extraordinary care.

WRIT OF ERROR to the Circuit Court of Livingston county; the Hon. JONATHAN DUFF, Judge, presiding.

This is an action on the case brought by Michael [*251] O'Brien against Curtis N. Bennett at the June term, 1864, of the Circuit Court of Livingston county, for the value of a mare. The plaintiff recovered a verdict for $120, on which the court rendered judgment, and the defendant appealed. The facts appear in the opinion of the court.

Messrs. STOUT, AMENT & PAYSON for appellant.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

O'Brien let Bennett, the appellant, have the use of his horse without compensation. This gratuitous bailment imposed on the appellant the duty of extraordinary care. After a drive in

January, 1864, of eighteen miles from his home, returning the next day, the mare sickened and died. The evidence is conflicting as to the cause of her death. Two witnesses swear that the defendant admitted she had been driven into a snow bank. The jury found a verdict for O'Brien, the plaintiff below, for the value of the mare.

The appellant insists that the court erred in refusing to give his 1st, 2d, 4th, and 7th instructions. The first was as follows:

If the jury believe from the evidence that the mare in question died from inevitable casualty or by causes or under circumstances over which the defendant had no control, and could not prevent, then they will find for the defendant, unless they further believe that the defendant was guilty of gross negligence and carelessness.

This instruction would have misled the jury. Although the direct cause of the mare's death may have been a disease over which the defendant had no control, yet if that disease was traceable to the slightest negligence on the part of the defendant, this would render him liable.

The second instruction was as follows:

[*252] If the jury believe from the evidence that the defendant used the same care, diligence and prudence in taking care of the mare in question that a prudent, careful man would take care of his own property under similar circumstances, they will find for defendant.

This instruction is wrong in assuming that the bailment was a bailment for hire.

When the loss of the mare is shown, the proof of negligence or want of care is thrown upon the plaintiff; it being a presumption of law that proper care and diligence were exercised on the part of the defendant.

There is some conflict of authority on this subject, but we think this instruction was properly refused in reference to a gratuitous bailee. When the death of the mare, in the hands of the defendant was proven, together with the character of the bailment, it devolved upon him to show that he had exercised the degree of care required by the nature of the bailment. These were facts peculiarly within his knowledge and power to prove, and any other rule would impose great difficulties upon bailors.

The seventh instruction was as follows:

If the jury believe from the evidence that the mare did not die from the effects of over driving and misusage on the part of the defendant, they will find for defendant.

This instruction, like the second, is objectionable because it assumes that the defendant was only bound to such care of the

mare as would be a bailee for hire. Even if the mare did not die from positive over driving and misusage, yet if her disease was traceable to the slightest negligence on the part of the defendant, he would be liable. The counsel for appellant regard the bailment as a bailment for hire. We do not so consider it, but if it were doubtful upon the evidence, these instructions are wrong in assuming it to be a hiring, instead of putting the case hypothetically.

In regard to the character of the bailment, it may be remarked that the fact of the plaintiff being saved the keeping of his horse by loaning him to the defendant, although [*253] to that extent the loan may be considered an advantage to him, does not take from it the character of a gratuitous bailment. Such incidental advantage is not the compensation necessary to make the bailment one of hire. The loan of the use of domestic animals necessarily involves their keeping. He who borrows the horse of another for a week's journey, must not only incur the expense of feeding him, but he must take the responsibilities of a gratuitous bailee. *Howard* v. *Babcock*, 21 Ill., 265. In the case before us, no compensation was paid for the use of the horse. We think the verdict sustained by the evidence.

Judgment affirmed.

BENJAMIN NEWELL, MILO KENDALL, GEORGE O. IDE, STEPHEN R. S. UFFORD.

v.

THE BOARD OF SUPERVISORS OF BUREAU COUNTY and CHARLES BALDWIN, DRAINAGE COMMISSIONER OF BUREAU COUNTY.

1. CHANCERY—*demurrers in.* A general demurrer to a bill in chancery admits all the facts in the bill which are properly pleaded, but not inferences of law from the facts.

2. SAME—*allegations of the bill.* Charges of fraud and usury should not be general, but the facts distinctly stated, on which the charges are based.

3. SWAMP LANDS—*the policy of the legislature in regard to them.* It was the intention of the General Assembly, under the various acts on this subject, to grant to the several counties in the State, the swamp and overflowed lands within their respective limits, and to remit to such counties, the exclusive control over these lands and over their proceeds.

4. SAME. No plea of want of consideration can be sustained to a note given for a portion of these lands, on the ground that the lands have not been reclaimed, and a system of drainage established and carried out.

APPEAL from the Circuit Court of Bureau county; the [*254] Hon. MADISON E. HOLLISTER, Judge, presiding.

This was a bill in chancery in the Circuit Court of Bureau county exhibited by Benjamin Newell and others, against the

county of Bureau, and Charles Baldwin, drainage commissioner, to enjoin the collection of certain notes executed by them, on the purchase of certain swamp lands, sold by Bureau county, and purchased by the complainants. The bill charged in general terms, fraud and usury, to which there was a general demurrer by the defendants.

The court sustained the demurrer, dissolved the injunction, and dismissed the bill.

From this decree, the complainants appeal to this court and assign the same as error.

Mr. MILO KENDALL and Mr. GEORGE O. IDE for themselves, and their co-appellants, submitted the following points:

1. The demurrer interposed by the defendants to the bill of the appellants, should have been overruled, and not sustained, by the Circuit Court. It was a general demurrer to the whole of the bill, and thus admitted all of the facts set forth in the bill, and the exhibits filed therewith and made part of the bill, to be true.

2. If a bill contain an allegation of fraud, it is a general rule that such an allegation must be answered, and a general demurrer cannot be allowed. Adams' Equity, top paging 739 cap. 4, note 2, citing, *Stoval* v. *N. Bank Miss.*, 5 Smedes & Marshall, 17 Miss. R.; *Anderson* v. *Lewis*, Freeman, 206; *Rambo* v. *Rambo*, 4 De Saussure, S. C., 251; *Niles* v. *Anderson*, 5 Howard, Miss., 365; *Carter* v. *Longworth*, 4 Hammond, Ohio, 384.

3. When the county sells upon the agreement with its vendees that it will drain the swamp lands sold, the law under which such sales are made also requiring such drainage, then the [*255] transaction becomes a contract between the county and its vendees, and the county cannot, any more than an individual, repudiate its agreement, or procure its release from a performance of its agreement, by subsequent legislation. We rest our case in this regard upon the basis of the contract, — express as it appears from the face of the bill, — made long prior to the passage of the Act of 1857, which purports to release Bureau county from drainage. Although the county may now be released by the State from the fulfillment of the trust, upon the execution of which depended its title to these swamp lands, as between it and the State, yet the county cannot thereby claim immunity from its engagements, upon the faith of which, the complainant Newell was induced to invest to so large an amount. The county of Bureau, we claim, should be held to its engagements.

Mr. GEORGE L. PADDOCK for appellees:

1. The bill shows no ground of relief, and the court below

was quite right in sustaining the demurrer. The demurrer confesses only such facts as are well pleaded in the bill. Story's Eq. Pl., sec. 452.

2. There is much said in the bill about "fraud," "usury," and "want of consideration," but no *facts* are stated which show that the county or its agents have dealt unfairly with the complainant, Newell, or his assigns; no *facts* are stated which support the clamor of "usury," and no *facts* are stated wherefrom the court can infer that the consideration of Newell's notes has failed or been wanting.

3. A county holds certain lands in fee, alienable in a given mode prescribed by the Legislature of the State; the proceeds of which lands, *when so alienated*, are, by the act, to be applied to their reclamation in a specified mode. But so far from exercising the power conferred by the Legislature, the county sees fit to disregard it, and to hold an utterly different sale from that described in the act—a sale upon credit, where its agent took notes instead of cash; gave bonds for deeds and in divers other respects variant from the statutory proceeding. To this sale Mr. [*256] Newell was a voluntary party, and neither he nor his assigns are injured, when, by a subsequent act, the Legislature ratify and affirm the transaction. Mr. Newell had no vested rights under the act of 22d June, 1852, as to drainage, for the simple reason that he did not bid at a sale held under that act.

Mr. JUSTICE BREESE delivered the opinion of the court:

The only question presented by this record, is, as to the propriety of sustaining a general demurrer to the bill of complaint of appellants.

It is insisted by appellants that inasmuch as the demurrer was general to the whole bill, it admitted all the facts stated in the bill to be true, and as fraud and usury were charged, those facts were admitted, and therefore the demurrer should have been overruled.

The rule is, as we understand it, and have repeatedly stated, that the effect of a demurrer is to admit all facts properly pleaded, but not inferences of law from those facts. *Stow* v. *Russel*, decided at April term, 1864; 1 Daniels' Ch. Pr., 601 *Mills et al.* v. *Brown et al.*, 2 Scam., 549.

The charges of fraud and usury are general, and do not show the facts on which the charges are predicated, consequently, it would be impossible to answer them. That such and such facts constitute fraud, or usury, as the case may be, may be but an inference drawn by the pleader from the facts, and as such inferences are not admitted by the demurrer, the facts must be distinctly charged. We fail to perceive in any of the allegations of

the bill, any specific charge of fraud or usury such as would be admitted by a general demurrer to a bill, or of such a nature as to call for an answer.

The whole case rests upon the policy adopted by the State in regard to the disposition of the swamp lands granted to the State by the United States, and by the State to the several counties in which those lands are situated.

[*257] We had occasion, in the case of *Supervisors of Whiteside Co.* v. *Burchell et al.*, 31 Ill., 68, to examine this whole subject, and we came to the conclusion, to which we adhere, where a party purchased swamp lands from a county in 1856, the year in which appellants purchased, and executed his notes for the absolute payment of the purchase money, he has no remedy to compel the county to appropriate the proceeds of the sales of such lands to their reclamation, as was contemplated by the legislation on the subject, in force at the time of his purchase; but his rights in that regard are to be determined by the policy subsequently adopted by the Legislature, which placed the whole subject of the control and disposal of these lands, and the appropriation of their proceeds in the hands of the several county authorities, and released them from all the liabilities and obligations theretofore imposed on them, respecting them.

From this, it follows, no plea of want of consideration can be sustained to a note given for the land, the reclamation of these lands being understood to be a part of the consideration of the note at the time the same was executed.

Perceiving no sufficient charge of fraud, usury, or want of consideration in the bill of complaint, or any other fact to weaken the claim of the county to payment of the note and mortgage, the bill appears without equity, and the court properly sustained the demurrer to it, and its judgment must be affirmed.

Decree affirmed.

JULIET PEASE, by ALBERT MORGAN, her next friend,

v.

CHARLES HUBBARD.

1. OFFICER—*escape from.* An officer who negligently permits the escape of a prisoner, is liable to any person injured by his neglect of official duty.

[*258] 2. SAME—*bastardy warrant.* An officer who negligently permits the escape of a person in his custody, on a bastardy warrant, is liable to the mother of the illegitimate child.

WRIT OF ERROR to the Circuit Court of Bureau county; the Hon. M. E. HOLLISTER, Judge, presiding.

This was an action on the case brought by Juliet Pease, a minor, by her next friend, Albert Morgan, at the December term,

1864, of the Circuit Court in Bureau county, against Charles Hubbard. The facts appear in the opinion of the court.

Mr. J. I. TAYLOR relied upon the following points and authorities as attorney for plaintiff in error:

A bond given by the father of an illegitimate child to the mother, in consideration that she will discharge him from a prosecution for bastardy is valid, the mother *has the exclusive control of such prosecution* and may compound and settle the same with such father. *Coleman* v. *Frum*, 3 Scam., 378; *Burgen* v. *Stranghan*, 7. J. J. Marshall, 584.

The proceeding for bastardy is strictly a civil remedy, and not in the nature of a criminal prosecution. 7 J. J. Marshall, 585; 2 Greene (Iowa,) 501.

A judgment for costs in favor of the mother, and against the father of an illegitimate child is good and valid, though the act of the Legislature be silent as to costs. Littell's Select Cases, 89.

An officer is liable for an escape even though the process be *voidable and erroneous.* 8 Mass., 9; Breese Rep., 285; 1 Scam. Rep., 201.

When damages result by the act of omission or commission of an officer, contrary to his duty, the party injured may have his action of case against the officer for such injury. 15 Johns. Rep., 250.

Messrs. STIPP & GIBONS for defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the [*259] court:

The plaintiff, Juliet Pease, sued the defendant, Hubbard, who was a constable, for having negligently permitted the escape of one Kent, whom the defendant had arrested under a bastardy warrant, issued upon the complaint of the plaintiff. The defendant demurred to the declaration. The court sustained the demurrer, and upon that decision the case is brought before us. The single question for determination is, whether an officer, under such circumstances, is liable for the escape, to the mother of the illegitimate child.

It was decided at the Ottawa term, 1864, in the case of *Mann* v. *The People*, that a prosecution under the bastardy act is a civil and not a criminal proceeding. Although in the name of the people, yet the object is not the imposition of a penalty for an immoral act, but merely to compel the putative father to provide for the support of his illegitimate child. The father is primarily liable for the support of his offspring. In the event of his failure to perform this duty, it devolves upon the mother, and in case of her inability, the child becomes a public charge as a

pauper. This law was designed to place the burden where it properly belongs, upon the immoral father, and prevent him from casting it either on the mother or the county. We are, then, wholly unable to see why this suit may not be maintained. If the officer negligently suffered the father to escape, he is liable to any one who was injured by his neglect of official duty. The plaintiff was clearly injured, because she is left liable to a burden from which it was the duty of the escaped prisoner to relieve her, and to secure the performance of which duty he had been arrested upon her complaint.

Judgment reversed.

[*260] JAMES H. EAMES and WILLIAM FORDHAM

v.

LANSING MORGAN, GILBERT MORGAN and EDWARD L. FURNISS.

1. FALSE AFFIRMATION—*ground for action on the case.* A false affirmation made by a party with intent to defraud another, whereby the plaintiff receives damage, is ground for an action on the case in the nature of deceit; and this, where the defendant making it, may not be benefited by the deceit.

2. CONTINUANCE—*when declaration amended—must be shown to be material.* A party complaining that a continuance was not granted on a declaration being amended, must show what the amendments were, and wherein they were material. It is only when material amendments are made, changing, in some degree, the character of the claim, that a continuance is allowed.

3. AMENDMENTS—*should be specified when defendant calls for them.* The circuit court should require the plaintiff to specify the amendments he has made to the narr., on being called on for that purpose by the defendant in a regular manner.

4. NOT GUILTY—*plea of, in case for deceit stands as a plea to amended narr.* The plea of not guilty filed to the original declaration in an action on the case for deceit, stands as the plea to the declaration when amended, and it is not necessary to refile it. The rule is, a defendant should answer an amended declaration anew, unless he has a plea in, which would answer any declaration in the form of action used.

5. FALSE AFFIRMATION—*instructions as to what sufficient.* It is sufficient to inform the jury, by an instruction, that every false affirmation does not amount to a fraud, and if, by an ordinary degree of precaution, the plaintiff could have ascertained the falsity of the representations complained of, then the plaintiff was not entitled to recover.

6. INSTRUCTIONS—*not to be on the contract, where deceit is the gravamen.* The court, in such action for a deceit, growing out of a contract, is not authorized to instruct the jury, where deceit is the gravamen of the action, upon any point involving the performance of the contract, out of which the deceit had its origin.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

This was an action on the case for deceit, brought in the Cook Circuit Court, by Lansing Morgan, Gilbert Morgan and Edwin L. Furniss, against James H. Eames and William Ford-
[*261] ham. The defendants pleaded not guilty, and there was a

trial, and verdict and judgment for the plaintiffs, to reverse which, the defendants bring this writ of error.

The counts in the declaration are substantially given in the opinion of the court.

The bill of exceptions shows that on the 19th of June, 1861, Eames filed the affidavit of his attorney, W. T. Burgess, stating that he was the attorney for Eames; that he was informed and believed that alterations, by interlinings and erasures, had been made in the declaration as originally filed, by the plaintiffs' attorneys, or under their direction, since the last trial of the cause; that he had not been furnished with any copy of such amendments, nor could he, from his recollection of the pleadings, as they originally were, tell what erasures and interlinings that appear are amendments and what are not, other than the change of the word "execution" to "executor," in the first count, and that it did not appear by any indorsement upon it, that the declaration, as amended, had ever been filed by the clerk of the court, and, therefore, moved the court for an order on the plaintiff to specify the amendments or alterations made in the *narr.* from what it was as originally filed and file them, which motion was resisted by the plaintiffs and denied by the court, and Eames excepted, and thereupon Eames made the further motion for a continuance of the cause because the declaration had been materially amended; the issues were not made up, and the declaration, as amended, had not been filed. The plaintiff resisted this motion, and read to the court the affidavit of B. M. Thomas, stating that he was one of the attorneys for the plaintiff; that by leave of the court, granted when the cause was on trial about six months before, the amendments in the declaration were made and thus amended, it was returned to the files of the cause more than ten days before the application by the defendant at the last term of the court, for a continuance, and he believes it was returned some months ago; that the declaration was taken from the files to be amended by permission of the judge of the court; and thereupon, [*262] the court denied defendant's motion, and he excepted.

On calling the cause for trial and a jury demanded by the plaintiffs, the defendant objected, alleging that the issues were not made up. The court overruled the objection, to which the defendant excepted. A jury was impaneled, and on the evidence and instructions of the court, they found a verdict for the plaintiffs for two thousand four hundred and eighty-four dollars. A motion for a new trial was denied, and judgment rendered on the verdict.

The case is brought here by writ of error, and the only errors assigned are those stated in the opinion of the court.

Much testimony was heard by the jury, which it is not neces-

sary to detail, as the principal controversy arises on the instructions of the court. They were as follows:

1. It is the duty of every party, in making a contract, to be honest and truthful in his statements and representations, and although a party to a contract is bound to exercise reasonable care and caution to prevent being defrauded; yet if the party committing the fraud make use of such false statements, representations and acts, with respect to a material inducement to the contract, as are calculated to deceive and mislead a person acting with common prudence and without indiscretion, and he is thereby induced to enter into a contract, or to part with his property, then such party cannot be heard to complain that the person so deceived and misled did not make such inquires as might have resulted in a discovery of the falsity of the representations.

2. That a party alleging fraud must prove it to the satisfaction of the jury, but in a civil action like the one at bar the party alleging fraud is not bound to prove its existence beyond a reasonable doubt. It will be sufficient if the fact is established in the minds of the jury by the weight and preponderance of the evidence only. It is not necessary that the proof [*263] should be of such a character as would warrant the conviction of the defendants in a criminal prosecution for false and fraudulent representations.

3. This action is not brought upon the contract given in evidence, and it is not necessary to the recovery of the plaintiffs that they should show performance of the contract by them. The action is based upon fraud and deceit, and loss to the plaintiffs resulting therefrom; and if the jury believe, from the evidence, that the defendants were guilty of the fraud and deceit alleged in the declaration, and that the plaintiffs delivered wood of some value to the defendant, Eames, and sustained damages in consequence thereof, then they will find the defendants guilty.

4. This action is not founded on or brought upon the contract offered in evidence, and it is not necessary to the recovery of the plaintiffs that both of the defendants are shown to have been guilty. The jury may find either of them guilty, if they believe, from the evidence, that the fraud and deceit was practiced upon the plaintiffs by either, as alleged in the declaration, and that the plaintiffs sustained damages in consequence of such fraud and deceit.

5. If the jury believe, from the evidence, that the defendants falsely and deceitfully represented to the plaintiff that no transfer of the said lot had taken place since the date of the abstract, as alleged in the first count of the declaration, with the intent and purpose as therein alleged, and that the plaintiffs, relying upon such representations, were induced to, and did, deliver wood

of value to the defendant, Eames, then they will find the defendants guilty.

6. If the jury believe, from the evidence, that the defendants made the representations and statements contained in declaration, and that the same were made with the intent as therein alleged, and that the plaintiffs, relying upon the said representations and statements, were thereby induced to deliver wood to the defendant, Eames, and that the representations and statements were false or fraudulent, as therein alleged, then they will find the defendants guilty.

7. If the jury find the defendants guilty, and believe, [*264] from the evidence, that defendant, Eames, accepted the wood lying at the depot, then they will be liable for the value thereof at Morgan's Station, if that was the place at which the same was to be delivered; and in order to ascertain whether there was an acceptance thereof, are entitled to take into consideration all the acts and statements of the defendant, Eames, in evidence, if any are in evidence, respecting the said wood, made to the freight agent and others.

8. If the jury find for the plaintiffs, and that the defendants are guilty of the fraud and deceit charged in the declaration, then, in estimating the damages, they may give the value of the wood, delivered by the plaintiffs to the defendant, Eames, at the place where the same was to be delivered, according to the terms of the contract, at the time the same was delivered, together with interest thereon to this date, together with such sum as will indemnify the plaintiffs for all damages directly sustained by them, by reason of the misconduct of the defendant, including such exemplary damages as the jury may think the circumstances warrant by way of punishment of the defendants for the fraud and deceit and of example to the community.

The defendant excepted to giving these instructions, and, on his own behalf, he asked of the court, the following instructions, in addition to those set out in the opinion of the court, and which the Circuit Court gave to the jury:

1. Every false affirmation does not amount to a fraud, if, by an ordinary degree of precaution, the plaintiff could have ascertained the falsity of the representations complained of, then the plaintiffs are not entitled to a verdict. To entitle them to a verdict, it should appear that the representations or means made use of were calculated to deceive a person acting with ordinary prudence, and on determining the question, the jury should consider the circumstances under which they were made, [*265] and whether, under the circumstances, the representations, were such as a person of common prudence could or should have relied upon, or as would be likely to mislead such a person.

2. The plaintiffs are not entitled to recover, unless the jury believe, from the evidence, that the defendants made the representations alleged in the declaration, and such representations were false, and were made with an intent to defraud plaintiffs, and that the plaintiffs were induced, by such representations, to make the contract.

3. If the plaintiffs shipped wood to defendant, Eames, that was more than one-third green, or that was not of the kind and quality mentioned in the contract between them and Eames. Eames was not bound to receive it, and if he did not receive such wood, the plaintiffs cannot recover for it.

5. That the bill in chancery read in evidence by the plaintiff, is no evidence of any fact stated in it, and can only be used to show the fact of a suit being instituted, but the plaintiffs having read the answers of defendant filed in the same cause as evidence, it is evidence tending to prove all the facts stated in it.

The instructions asked by defendant numbered four, six, seven, eight, nine, ten, eleven, twelve and thirteen, were refused by the Circuit Court. They are copied into the opinion of this court, and it is, therefore, unnecessary again to state them.

Mr. WILLIAM T. BURGESS argued for the plaintiffs in error. He said he did not deny that an action for deceit, in the sale of real estate, would lie, but denied that it could be predicated on the false statements made in this declaration. He said the statements, the falsity of which give a cause of action, are such as the party is in duty bound to make truly, so far as he knows, and for the truth of which, the party seeking the answer must, and has a legal right to, rely upon that source of information, and in [*266] common prudence, would look no further or elsewhere, or had not the means in his power to correct. Citing *Sims* v. *Klein*, Breese, 234; *Dunbar* v. *Bonesteel*, 2 Scam., 34; *Pasley* v. *Freeman*, 3 T. R., 51.

He attempted to sustain two propositions:

1. That there was no damage to the plaintiffs.

2. That they did not use common prudence in the negotiation, and again cites and commented on *Pasley* v. *Freeman* and *Stone* v. *Bennet*, 5 Hill, (N. Y.,) 303, and took a distinction between the case before the court, and that of *Weatherford* v. *Fishbach*, referring to *Kirkland* v. *Lott*, 2 Scam., 12, to sustain this view.

He contended that the first count of the declaration was fatally defective. It is not charged that they entered into the contract in consequence of the pretences, but that they delivered the wood in consequence of them. Nor was it charged in any count, that

the plaintiffs did not know the contrary of defendant's allegations, nor is it charged in any count, that the deed to Otis was of record.

He also insisted, that the motion for a continuance on account of the witness McMahon should have been allowed, that his evidence was material and diligence was shown. He also insisted that the plaintiffs should have been ruled to specify the amendments made to the declaration.

In commenting on the instructions, he said the first concedes at the outset, that a party to a contract was bound to exercise reasonable care and caution to prevent being defrauded, and it concludes by saying, he "need not make such inquiries as might have resulted in a discovery of the falsity of the representations," without distinguishing in any manner, as to the source at which to make such inquiry, or the subject matter of it. He did not think a man used ordinary care and caution when buying land, if he failed to examine the records.

He then commented on the third instruction, and said, when the court told the jury that the action was based upon fraud and deceit and loss to the plaintiffs resulting there- [*267] from, it stated what was not the law, and second, if the plaintiffs neither performed nor undertook to perform their contract, they could not have sustained damage, and it was objectionable, because it assumes that the plaintiffs were entitled to recover if they "delivered wood of some value to the defendant and sustained damages in consequence thereof," whether there was any connection between such delivery and damage, and the contract, or not. He said these objections applied more or less to all the instructions; and insisted that the third instruction given for the defendants was in direct conflict with the third given for the plaintiff.

Messrs. GOOKINS, THOMAS & ROBERTS argued for defendants in error, and said in reply that the action was brought November 16, 1858. On the 10th of October, 1860, leave was given to amend the declaration. On the 18th of May, 1861, the case was called for trial, and continued by the plaintiffs in error, and set for trial on the 18th of June following, without objection from plaintiffs in error, and that on that day, they again moved for a continuance, and renewed the motion on the next day. They insisted there was no error in overruling these motions, because the amendments were made by leave of the court, and a party may interline his pleadings, citing *Weatherford* v. *Fishbach*, 3 Scam., 170, and that it did not appear the amendment was material, or worked any injury to defendants, or that they were unprepared for trial in consequence thereof, and if it was a mate-

rial amendment, it was made ten days previous to the term at which the cause was tried, and further, that plaintiffs were not bound to refile the narr., as amended, there being no new counts added, and the general issue being in to the original narr., it was an answer to the amended narr. as well. Nor was it necessary to refile the plea of the general issue, or plead it again, citing *McAllister* v. *Ball*, 28 Ill., 210; *Wright et al.* v. *Lessee of Hollingsworth*, 1 Peters, 185.

[*268] They then discuss the nature of the action, and the propriety of the instructions, and insist that the doctrine in England, and in almost all the States, is, that a party must respond in damages for fraudulent representations, with respect to the state of the title to land he sells, citing *Pasley* v. *Freeman*, 3 Term. R., 56; *Culver* v. *Avery*, 7 Wend., 380; *Mard* v. *Wiman*, 17 Ib., 193; *Whitney* v. *Allaire*, 1 Comstock, 305; *Cravens* v. *Gant*, 4 Monroe, 126; *Browning* v. *Bancroft*, 8 Met., 278; *Upton* v. *Vail*, 6 Johns., 181; *Weatherford* v. *Fishbach*, 3 Scam., 170.

The following propositions they urged covered all the points involved in this case, and were settled law:

That an action on the case will lie for the assertion of a falsehood with a fraudulent intent as to a present or existing fact, where a direct, positive and material injury results from such assertion, citing *Benton* v. *Pratt*, 2 Wend., 386.

That the action will lie, whether the false representation be made respecting the title to real estate, the boundaries thereof, or incumbrances thereon, during the treaty, even though the negotiations be consummated by a written contract or deed with covenants against incumbrances, citing *Culves* v. *Avery*, 7 Wend., 381; *Ward* v. *Wiman*, 17 Ib., 198.

That it was immaterial, that the party making the fraudulent representations had no interest in the subject matter and expected to derive no advantage from it, citing *Weatherford* v. *Fishbach*, 3 Scam., 175; *Olmstead* v. *Hotaling*, 1 Hill, 317.

That the defendant could not allege that the plaintiff was guilty of folly in relying upon the representations, when, by using proper care, he could have ascertained their falsity, if the defendant uses any means or artifices to induce the plaintiff to forego inquiry, citing *Weatherford* v. *Fishbach*, *supra*, *Kirkland* v. *Lott*, 2 Ib., 13.

That it matters not whether the contract of the parties be executed or executory, citing *Whitney* v. *Allaire*, 1 Comst. 303.

[*269] And that the action will lie, although the fraudulent representations are not contained in the conveyance, nor in

the written contract entered into between the parties, citing *Dabek* v. *Stevens*, 3 Barn. & Cres., 623.

In conclusion, they insisted the narr., and each count of it was good; that it sufficiently appeared by it that they were induced to enter into the contract to deliver the wood by the fraud and deceit of the plaintiff in error; that the material inducement to making the contract was the representations of the plaintiff in error that the title was perfect and no incumbrance on it; that the representation was fraudulent, by means whereof the defendants in error were damnified.

Mr. JUSTICE BREESE delivered the opinion of the court:

This is an action on the case for deceit on the part of plaintiffs in error, in selling a lot of land in Chicago, for a quantity of wood, they falsely representing the lot to be clear of incumbrance. A bond was executed by Eames, for the conveyance of the property, clear of incumbrance, on the delivery of the wood of the kind and quality, and at the place therein specified, Eames to retain possession of the lot until the wood should be delivered.

There are five counts in the declaration, all alleging in substance, that the defendants in error were induced, by the fraudulent acts and declarations of the plaintiffs in error, to sell and deliver to them one thousand cords of wood, and to receive therefor, a lot of ground, with the appurtenances, in the city of Chicago, which one of the plaintiffs in error, Eames, was to convey to them on the delivery of the wood; that plaintiffs in error falsely represented that they had good title, that the lot was free of incumbrance, and that they would convey when the wood was delivered. The general issue was pleaded, a trial had, and a verdict and judgment rendered for the defendants in error for two thousand four hundred and eighty-four dollars and costs. This judgment the plaintiffs in error brought here, by writ of error, and have assigned as errors, the following:

1. That the declaration is insufficient, if there is any [*270] in the cause, upon which to render any judgment.

2. The court refused a continuance of the cause on the 13th of May, 1861.

3. The court refused the motion for the plaintiffs to specify the amendments in the declaration.

4. The court tried the cause without the issue being made up, the defendant, Eames, objecting.

5. The court refused the motion for a new trial on the part of each of the plaintiffs in error.

6. The court erred in the several and various rulings made on the trial of the cause, to which the defendant at the time excepted.

7. The instructions for the plaintiffs were severally erroneous.

8. The instructions asked by the defendant, and refused by the court, should have been given.

As to the first error assigned, we are of opinion that the declaration is good in form and substance. The action was case for fraud and deceit, and not upon the contract to convey the lot of land. The averments in the declaration are, in the first count, after setting out the bond for the deed, that after the execution of the bond and condition, the said plaintiffs, under and by virtue and in performance of said contract, delivered to the said Eames a large quantity of wood, to wit, one thousand cords of wood, of great value, etc., and the plaintiffs aver that they have never received any payment or consideration whatever for said wood, and also that the sole inducement to the plaintiffs for delivering the wood, was the obtaining a good and sufficient title, free of incumbrance, of the real estate above described, according to the provisions of the bond and condition; and also that the defendants falsely, fraudulently and knowingly, and for the purpose of deceiving the said plaintiffs, and before the consummation and delivery of the wood, represented to the plaintiffs that the defendants had a good and valid title to the said real [*271] estate, when in truth and in fact, the said Eames and Fordham, at the time they made such representations, had conveyed the same in fee, by deed, on the 16th of June, 1857, to one James Otis, as trustee, in security for the payment of eleven hundred dollars in four months from the date thereof; and further, that the said lot was sold on the 7th day of April, 1858, in default of the payment of said eleven hundred dollars, by virtue of a power of sale in said trust deed in default of payment of the said sum of money, and the plaintiffs further aver, that on inquiry being made by the said plaintiffs, during the negotiation, in reference to said contract as to the title to the said lot, the said defendants proposed to furnish an abstract of the title thereof, and thereupon did, on the day of the date of said bond or during the negotiation preceding the execution of said bond, furnish an abstract which extended down to the 13th day of June, 1857, three days anterior to the conveyance aforesaid, to James Otis, pretending, fraudulently, and for the purpose of deceiving the plaintiffs in the premises, that no sale or transfer of the lot had taken place since that time, and the plaintiffs aver that although they have demanded a deed from said Eames of the lot, in accordance with the said agreement, the said Eames has omitted to execute such deed, and is, and always has, since the execution of said bond, been utterly unable in law and in fact to make a good title to the said lot clear of all incumbrance. And that they, said plaintiffs, by means of such false and fraudulent

representations and pretenses, and confiding in the same, were induced to and did deliver the said wood to the said Eames. The other counts do not differ materially from this, and we are at a loss to perceive what element is wanting to make it a good declaration in an action on the case for a deceit.

The rule is well established, that a false affirmation made by a defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit. *Pasley et al.* v. *Freeman*, 3 Term. Rep., 51. And this when the defendant may not be bene- [*272] fited by the deceit, or that he should collude with the person who is benefited. *Ibid; Weatherford* v. *Fishbach*, 3 Scam., 170. With how much greater force should this principle apply, where the defendant is benefited by the deceit? The proof sustains all the material allegations of the declaration, and shows a case of the most deliberate and premeditated fraud, going to the extent of preparing an abstract of title showing the title to be in Eames three days before the consummation of the bargain. This shows deliberation and contrivance, and on the presumption that the defendants in error were dealing with an honest man, a resort to the records would not, by an ordinarily cautious man, be deemed necessary. It was a deliberate, well concerted plan to get the wood for a lot incumbered to near its full value, under protestations and assertions all the time that it was free of incumbrance.

As to the second error, refusing a continuance on the 13th of May, 1861, by reason of the amendments to the declaration, it is sufficient to say, the plaintiffs in error fail to show what those amendments were, and wherein they were material. It is only where material amendments are made, changing in some degree the character of the claim, that a continuance is allowed. *Hawks* v. *Lands*, 3 Gilm., 227; *Illinois Marine and Fire Ins. Co.* v. *Marseilles Manufacturing Co.*, 1 Gilm., 236; *Covell et al.* v. *Marks*, 1 Scam., 525.

As to the third point, the Circuit Court should have required the plaintiff to specify the amendments he had made to the declaration, on being called on for that purpose by the defendant, in a regular manner, as he was so called on in this case. This was an error, but not of a character sufficient to reverse the judgment, the record showing a full and fair trial on the merits.

Upon the fourth error assigned, the cause was not tried without the issue being made up. The plea of not guilty, the only plea to the action, was filed, and it was not necessary to file it again. There it stood for the defendants' benefit, under which they could give every conceivable matter of [*273] defense, and which, the record shows, they did do. The rule

is, a defendant should answer an amended declaration anew, unless he has a plea on file which would answer any declaration in the form of action used. *McAllister* v. *Ball*, 28 Ill., 210.

As to the fifth and sixth errors assigned, we see no reason for granting a new trial, nor any exceptionable rulings of the court in the progress of the cause, save the one we have already noticed.

Now as to the instructions. Those given for the plaintiffs placed the case on the ground of deceit, the only ground on which it could be placed, and there is nothing in any one of them to which exception could be taken.

The instructions given for the defendant were as favorable to him as the case justified. The jury was told that every false affirmation did not amount to a fraud, and if, by an ordinary degree of precaution, the plaintiffs in this case could have ascertained the falsity of the representations complained of, then the plaintiffs were not entitled to a verdict. To entitle them to a verdict, it should appear that the representations or means made use of were calculated to deceive a person acting with ordinary prudence, and in determining this question, the jury should consider the circumstances under which they were made, and whether, under the circumstances, the representations were such as a person of common prudence would or should have relied upon, or as would be likely to mislead such a person. The jury were further told the plaintiffs were not entitled to recover unless the jury believed, from the evidence, that the defendants made the representations alleged in the declaration, and such representations were false, and were made with an intent to defraud plaintiffs, and that the plaintiffs were induced by such representations to make the contract. The court also instructed the jury for defendants, if the plaintiffs [*274] shipped wood to defendant, Eames, that was more than one-third green, or that was not of the kind and quality mentioned in the contract, Eames was not bound to receive it, and if he did not receive such wood, the plaintiffs cannot recover for it.

The following instructions asked by the defendants were refused, and exceptions taken:

If the jury believe, from the evidence, that the defendants made the representations alleged in the declaration, yet the plaintiffs are not entitled to recover for the wood delivered under the contract with Eames, if they believe, from the evidence, that plaintiffs did not perform their contract with defendants, by delivering one thousand cords of wood at the time and of the kind and quality mentioned in said contract, and if the plaintiffs did not perform the entire contract they cannot recover, because the defendant, Eames, was not bound to perform his part of the contract

until the plaintiffs had performed on their part according to the terms of their contract.

The court instructs the jury, that upon the pleadings and proofs in this case, the plaintiff is not entitled to recover.

The court instructs the jury, that as a matter of law, the plaintiffs are not entitled to recover in this action against Eames and Fordham for the violation or non-performance of the contract between plaintiff and Eames.

The court instructs the jury, that though they may believe, from the evidence, that the defendants made the false and fraudulent representations alleged in the declaration, yet the plaintiffs are not entitled to recover upon the pleadings in this cause.

If the plaintiffs are entitled to recover at all, they can only recover the value of the wood delivered, and such as was of the kind and quality mentioned in the contract, after deducting therefrom the freight.

The court instructs the jury, that they cannot render a verdict against the defendant, Fordham, for any default or non-performance on the part of defendant, Eames, of his contract with the plaintiffs.

If the jury believe, from the evidence, that the defend- [*275] ants did make the representations alleged in the declaration, and also that they were false, yet the plaintiffs cannot recover if the jury further believe from the evidence that the defendants did not intend to deceive and defraud the plaintiffs. If, therefore, the defendants at the time they made such representations intended in good faith to remove the incumbrances upon said land by the time they were to convey the same to the plaintiffs, and were prevented from doing so by the non-performance of the contract on the part of the plaintiffs, then the plaintiffs cannot recover.

Every false affirmation does not amount to a fraud. If, by an ordinary degree of precaution, the plaintiffs in this case could have ascertained the falsity of the representations complained of, then the defendants are not liable, and the searching of the records of the county was an ordinary degree of precaution which the plaintiffs ought to have taken before concluding the purchase.

If the jury believe, from the evidence, that the plaintiffs did not comply with and keep their written contract, in evidence, with Eames on their part, they are not entitled to any damages as against him under that contract, in any form of action. And in this case, as the plaintiffs must have sustained actual damage, recognized by the law as such, if the plaintiffs have not shown any damage sustained by them other than the failure of Eames

to comply with that contract by conveying the land clear of incumbrance, the jury will find for the defendant.

Keeping in view that this action is not brought on the contract, or for its violation, but for fraud and deceit, the propriety of the refusal of these instructions is obvious. The gravamen of the action is the deceit practiced by the plaintiffs in error, and it is totally immaterial, in this view, whether the defendants in error performed their contract or not.

[*276] The instruction marked eleven, and refused, was substantially given by the court for the defendants, and is embraced in the one first given.

We perceive no error in refusing these instructions. The merits of the case, on law and fact, were fully before the jury, and we are satisfied they rendered a proper verdict.

We omitted to notice, in the proper place, the exception to the refusal of the court to continue the cause, on defendants' affidavit, of the absence of a witness, McMahon. As the suit is not brought on the contract, his testimony was not material, consequently the court did not err in refusing the continuance. The court, however, did continue the cause until the second day of the next term, to enable the parties to prepare for trial, to which the defendants did not object. The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

ISAAC WELLS and JOHN SEARS
v.
MERCIE H. MILLER.

1. SALE OF PROPERTY. A father being at the point of death on a barge loaded with lumber belonging to him, gave to his son, who was with him, a bill of sale of the lumber, and directed him, in the instrument, to pay from the proceeds of the lumber a balance due to the persons from whom it was purchased. The son was of age and the father was to some extent indebted to him. Held, no fraud being shown, that the administratrix of the father acquired no title to the lumber by her letters of administration.

2. PRACTICE—*diligence in searching for written instruments.* Where an instrument has never been in the custody or control of a party wishing to use it, and is of such a character that the law does not presume it to have been in his control, he will not be required to show a diligent search among his papers before giving parol evidence of its contents.

3. SAME. Where it appears that the *duces tecum* clause in a subpœna would have been unavailing, there is no want of diligence in failing to insert it.

[*277] APPEAL From the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

This was an action of trover brought by Mercie H. Miller, administratrix of Joseph C. Miller, deceased, against Isaac Wells and John Sears, impleaded with John S. Noble, at the

April term, 1862. The jury found a verdict against Wells & Sears for $2,100, whereupon they appealed. The facts appear in the opinion of the court.

Messrs. BONNEY, MARTIN & BURNHAM for appellants.

Mr. J. S. PAGE for appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

In April 1860, Joseph C. Miller, now deceased, bought of Wells & Sears, the plaintiffs in error, a quantity of lumber, paying a part of the purchase money, and leaving about $1,400 due. Miller, with his son Franklin, took the lumber to St. Louis, where he shipped it on a barge for Memphis. The barge was wrecked upon the rocks near the town of Commerce, in Missouri. Miller died upon the wreck, and Franklin, leaving the boat and lumber in temporary charge of the pilot, returned to Chicago. It was then determined by him and Wells & Sears, to send an agent immediately to take charge of the lumber, transport it to Memphis and sell it. Noble, one of the defendants below, and an employee of Wells & Sears, was sent for this purpose, bearing a letter from Franklin to the person left by him in charge of the lumber, informing him that Noble went as agent for Franklin, and also bearing a letter of instructions from Franklin to himself. Franklin joined Noble at Cairo, and went with him to Memphis, where he remained a few days and then returned to Chicago, leaving the business in charge of Noble. The latter sold the lumber partly for cash and partly on credit, taking the notes in his own name or that of Wells & Sears. The sales amounted to about $3,328, and exceeded by about $760, the money expended in saving the wreck and the [*278] balance due Wells & Sears on the purchase of the lumber. Letters of administration were afterwards taken out by the defendant in error, who is the widow of Miller. She then brought the present action of trover against Wells, Sears & Noble, on the theory that the lumber, in being taken from the wreck to Memphis, was brought on the Illinois side of the river, and within the jurisdiction of this State, and that the title of administratrix thus attached by relation. The jury found a verdict against Wells & Sears for $2,100, and they bring the case to this court.

On the trial, the defendants called Franklin Miller as a witness, and proved by him, that shortly before his father's death on the barge, the latter executed and gave to the witness, a written instrument for the purpose of transferring the lumber to him. The witness testified that he did not know where this instrument or bill of sale was, and that he believed it to be lost, and the de-

fendants' counsel then offered parol evidence of its contents. This evidence the court excluded. After the verdict, the defendants moved for a new trial for the reason, among others, that the witness, after the trial, had found the bill of sale, and a copy of it is set out in the affidavits filed with the motion. It is thus brought before us, and is as follows:

"For and in consideration of past services, and a sum of money received of Harvey Huntoon, of Aurora, I hereby sell and deliver to my son, Franklin R. Miller, all my right, title and interest of the barge St. Louis, and a cargo of lumber now on said barge, lying near Commerce, Missouri, said Franklin R. Miller to have and hold the barge and cargo, and when sold, to pay Wells & Sears the amount of their bill due on the lumber.

J. C. MILLER.

Commerce, Mo., May 5."

It cannot be denied that, as the record now stands, this instrument was very material evidence for the defendants. There is nothing in the facts before us to taint it with fraud, [*279] even if the administratrix could be permitted to impeach it on that ground. The proof shows that Franklin was at the time twenty-seven years of age; that he was in the service of his father, and that he had advanced some money of his own for the purchase of the barge. If his father was indebted to him, as the bill of sale admits, and the record tends to show, it was in the power of the former to transfer to him the title of the lumber by an instrument of this character, and to charge the property in his hands with the payment of the debt due upon it to Wells & Sears. A written instrument was not, it is true, necessary to a transfer of the property in payment of a debt due Franklin, if there was a delivery of the possession for that purpose, but inasmuch as there was a written instrument, showing the precise character of the transaction, and tending to show such a delivery of possession as the circumstances of the parties and the situation of the property admitted, it was very material to the defendants to be permitted to prove the contents of such instrument. For the evidence shows that Franklin accepted this transfer with its attendant trust, and acted in conformity with it. He proceeded to Chicago, sent down Noble as "his agent," to take charge of the property, and permitted him to receive the proceeds for the payment of the debt due Wells & Sears. Their debt being overpaid by the proceeds, he can make them account to him for the residue. By this transaction, so far as now appears, the title to the lumber passed to Franklin. He had charge and virtual possession of the property when the instrument was executed, and through agents, continued in such possession, ex-

cept so far as he permitted Noble to sell for the purpose of paying the debt charged upon the property. The administratrix, therefore, never acquired title by her letters of administration.

This instrument being thus material, it remains only to inquire whether the court erred in excluding parol evidence of its contents. It is urged that there was a want of due diligence on the part of the defendants — that a subpœna *duces tecum* should [*280] have been issued and a search made for the instrument then supposed to be lost, but afterwards found. If the instrument had ever been in the custody or under the control of the defendants, it would have been incumbent on them to make diligent search among their own papers before offering the parol evidence. But it was not an instrument which the law would presume to be, and the proof showed it never had been, in their custody. Neither was it in their power to compel the witness to make diligent search. A subpœna *duces tecum* would have been necessary if the evidence of the witness, when placed upon the stand, had not shown that the *duces tecum* clause would have been unavailing. He testified that he went to Kentucky some months before and took all his papers with him, that he afterwards looked them over and did not find this one; that he had written for it to Kentucky, and it could not be found, and that, so far as he knew, it was lost. The court below ruled that the deposition of the custodian in Kentucky should have been taken, but it does not appear that these defendants knew there was a custodian of the witness' papers, nor did that fact appear on the trial.

The witness swore that he had never seen the paper since the July following his father's death, a period of more than three years, and that his impression was, he had burned it. The defendants had no means of information before the trial, as to the locality of this paper, except such as the witness chose to give them, and when interrogated by them it is to be presumed he stated what he swore on the trial — that he had looked over his papers and did not find the instrument in question, and so far as he knew, it was lost. The defendants were obliged to accept the statements of the witness, and could go no further, and we can perceive in them no want of the requisite diligence. It is not of course proper to look at the statements of the affidavits for a new trial in considering the decision of the court excluding parol evidence on the trial, but it is proper to remark that the fact that the paper was soon after found does not impeach the statement of the witness, as to its supposed loss, inasmuch as it appears to [*281] have been finally found in Kentucky, in the pocket of an overcoat which the witness had not worn for two years, and was not among his papers.

We are of opinion that there was error in excluding from the jury parol proof of the contents of this instrument. In the view we have taken of the case it is not necessary to consider the other points raised. The judgment is reversed and the cause remanded.

Judgment reversed.

GEORGE A. BELCHER and WILLIAM H. BELCHER

v.

PETER VAN DUZEN.

1. REPLEVIN—*dismissing for want of jurisdiction—when not proper.* In an action of replevin where the issues are non-detinet, not the property of the plaintiff, and property in the defendant, and the fact of a partnership between the plaintiff and defendant is evolved on the trial, it is erroneous to dismiss the cause, on motion of the defendant, for want of jurisdiction.

2. EVIDENCE—*of partnership for the jury.* Such evidence should go to the jury, and would perhaps, have determined the first issue for the defendant.

3. ISSUES—*not to be taken from jury.* It was the right of the jury to decide the case on the evidence under the issues as they were made up, and although there might be a partnership between the parties to the suit, still, the plaintiff may have had the exclusive right to the immediate possession of the property in dispute.

WRIT OF ERROR to the County Court of LaSalle county; the Hon. P. K. LELAND, Judge, presiding.

This was action of replevin brought in the County Court of LaSalle county, by George A. Belcher and William H. Belcher, against Peter Van Duzen, for certain farming implements, some household and kitchen furniture, and a lot of cane seed.

[*282] The defendant pleaded, *non detinet.* 2. That the property was not the property of the plaintiff; and 3. That it was the defendant's property. Issues were made up on these pleas, and the cause went to the jury, when, in the progress of the trial, the fact was disclosed, that the plaintiffs and defendant, were engaged, as partners in the cultivation of sorghum, whereupon, on motion of the defendant, the court dismissed the cause.

The plaintiffs excepted to this action of the court and bring the case here by writ of error, assigning that dismissal as the principal error.

Messrs. LELAND & BLANCHARD for the plaintiff in error.

Messrs. GLOVER, COOK & CAMPBELL for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the court.

This was an action of replevin, brought in the LaSalle County Court, by the plaintiffs in error, against the defendant in error,

for certain agricultural implements, stoves and pipe, and household furniture, and a lot of sugar cane seed.

The pleas were: 1. *Non detinet.* 2. Not the property of the plaintiffs, and 3. Property in defendant, on which issues were joined. During the trial, a written contract between the parties was introduced in evidence, whereupon, the defendant's counsel entered a motion to dismiss the suit, for the reason, that it appeared from the contract, that the plaintiffs and defendant were partners. The court sustained the motion, and this ruling is the only point in the case.

It appears, issues were made up on the questions of detainer, property in the plaintiffs, and property in the defendant. These issues, the jury were sworn to try, and if, in trying them, the fact of a partnership was evolved, that would, perhaps, have determined the first issue for the defendant. The evidence of partnership, was not evidence for the court alone, but for the jury, under the issues, and the court had no right to take the [*283] consideration of that fact, from the jury. They were quite competent to determine it for themselves, and if found by them to be true, their verdict would probably be for the defendant.

There was manifest error in thus taking the cause from the jury, and deciding on evidence which it was the province of the jury to weigh and decide upon, and which, on being decided by them, in a particular way, would have decided the case. Who owned the property was another issue. If it was partnership property, and so found by the jury, their verdict would have been for the defendant. The jury had the right to decide the case on the evidence under the issues made up.

It might be, however, that the plaintiffs had the exclusive right to the immediate possession of the property, and so had a verdict.

For the error assigned, the judgment is reversed and the cause remanded.

Reversed and remanded.

JOSEPH STOUT *et al.*
v.
ISAAC COOK.

1. DESCRIPTION — *when void for uncertainty.* A levy of an execution upon a tract of land by the description of the "East fractional Southeast Section 6, 33, 4," would not be a levy upon the "East fraction of Section Six," the section having been so surveyed by the government as to make both an East fractional part and a Southeast fractional quarter, distinct from each other, the land being intersected by a river.

2. CLOUD UPON TITLE. Although the levy and sale, and deed in pursuance of them are void for uncertainty, yet when the defendant claims title under them, a court of chancery will render a decree quieting the title.

APPEAL from the Circuit Court of Will county; the Hon. JESSE O. NORTON, Judge, presiding.

[*284] This was a bill in chancery to quiet title. The facts appear in the opinion so far as they are material the points decided.

Messrs. LELAND & BLANCHARD for appellants.

Mr. W. T. BURGESS for appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

The East half of section six, township thirty-three, North, range four East of the third meridian, is so intersected by Fox River, as to cause the government survey to throw a fraction containing 45 7-100 acres on the East side of the river. This fraction extends from the South line of the section to within about forty rods of the Northeast corner, thus lying East of the greater part of the entire East half of the section, but separated from it by the river. It was separately surveyed by the government, and is described in the survey as "the East fraction of section six, (East of Fox River,) in township thirty-three," etc. The land was patented by this description to Cook, the appellee, and afterwards levied upon under a judgment and execution against him, sold, and conveyed by the sheriff. The levy, certificate of sale and sheriff's deed, all describe the land as the "East fractional Southeast quarter of section 6, 33, 4." The bill is filed by Cook, alleging that the grantees, under the sheriff's deed are claiming title under this description, to the East fraction of the section as above described, and asks to have the sale and deed set aside as a cloud on complainant's title. The court below so decreed.

We are unable to so construe the description "East fractional Southeast quarter of section six," as to make it apply to all, or any definite part, of the "East fraction of section six." By this last description, the government had surveyed and patented a piece of land which was no part of either the Northeast or of the Southeast quarter. As we understand the plat which is incorporated into the record, there are a Northeast and a [*285] Southeast quarter of section six, which lie West of the river, and do not include any portion of the East fraction, which is a distinct survey. The description adopted in the levy does not, therefore, apply to any parcel of land. As it stands, it is without meaning. By rejecting as repugnant the words "East fractional," the levy would then describe merely the Southeast quarter, which, as we have above remarked, would not include any portion of the land in controversy.

The counsel for the appellant urge that the words "East frac-

tional Southeast quarter," mean the same thing as the "East fraction of the Southeast quarter," and that this would mean that portion of the fraction East of the river, and East of the Southeast quarter. If the words of the description could be changed as counsel suggest, we do not perceive that the result claimed by them would follow. If the land surveyed as the East fraction of the section forms no part of the Southeast quarter, the description, even thus changed, would not describe the fraction or any part of it. Neither, in any event, do we perceive how the "East fraction of the Southeast quarter," could be considered as describing any specific tract of land unless the government, in its survey, applied that description to some special tract. It would be only equivalent to "East part of the Southeast quarter," which would be a void description for want of definite locality. The government, by its survey, has localized the "East fraction of the section," and we know precisely what the fraction is, by its metes and bounds. But it has made no such survey as the East fraction of the Southeast quarter, and therefore that description, if it had been used in the levy, would leave us entirely uncertain, in the absence of such survey, what particular fraction was sought to be described. We regard the levy and deed as void for uncertainty.

But although the levy and sale are void, the defendants below are claiming the land under them, and thus creating a cloud on complainant's title. The court below, therefore, properly rendered a decree quieting the title, and the decree is affirmed.

Decree affirmed.

LEWIS B. JUDSON [*286]

v.

HIRAM GOOKWIN.

1. PROMISSORY NOTE—*guaranty—effect thereof.* An endorsement of a promissory note by the payee in this form, "I guaranty the collection of the within note," is nothing more than a simple assignment, for, by the Statute, the assignor, in every case, unless restricted by the terms of the assignment, undertakes that the note can be collected, and if it cannot be, then he will pay it.

2. GUARANTY—*what is.* By the phrase, "I guaranty the collection of the within note," the liability of the endorser is neither increased nor diminished.

3. SAME—*when consideration necessary.* Though the guaranty is made long after the execution of the note, if made by the payee, no consideration therefor need be averred.

4. DILIGENCE—*when endorser liable.* On such an endorsement, if due diligence to collect the note is shown, the endorser is liable.

5. ASSIGNEE—*where to sue.* An assignee of a negotiable note is not bound to sue the maker out of the county where the maker resides.

6. SAME—*to what diligence bound.* Ordinary diligence to collect is all to which the assignee of such paper is bound.

APPEAL from the Circuit Court of Kendall county; the Hon. MADISON HOLLISTER, Judge, presiding.

Statement of the Case.

This was an action of assumpsit in the Kendall Circuit Court, by Hiram Goodwin, against Lewis B. Judson, as endorser of a note of the terms following:

$586.33. OSWEGO, 18*th Dec.*, 1857.

Four years after date, I promise to pay to the order of Lewis B. Judson, five hundred and eighty-six 33-100 dollars, at the County Clerk's office, with interest after due at ten per cent., value received.

E. G. AMENT.

On which note was this indorsement:

I guarantee the collection of the within note.

L. B. JUDSON.

[*287] The opinion of the court sufficiently states the nature of the pleadings.

There was a trial, and verdict for the plaintiff for seven hundred and seven 14-100 dollars, a motion for a new trial made and overruled, and exception taken, and judgment entered on the verdict, from which this appeal is prosecuted.

Much testimony was taken to show the ability of the maker to pay the note at its maturity, which it is unnecessary to give in detail. It was all considered by the jury, as was also the testimony on the question of diligence.

After the plaintiff had rested his case, the defendant moved the court to exclude the guaranty from the jury, for the reason that, from the plaintiff's own showing, the guaranty was made to Jerome Dygert, and not to the plaintiff, and being a special and limited guaranty, was not negotiable, and hence the plaintiff had not shown that he was entitled to an action in his own name as against the defendant, which motion the court overruled, and the defendant excepted. He also moved the court to exclude the note from the jury, which the court also denied, and to which the defendant excepted. It appeared in evidence, that Judson transferred the note to Dygert.

The testimony of several witnesses was had, as to the plaintiff's being able to institute a suit against the maker of the note at a time earlier than he did commence the suit, the particulars of which testimony it is not material to give.

The weight of the evidence, on the point of the collectibility of the note of Ament, the maker, was decidedly against the defendant, in the opinion of the jury. Deeds of trust, mortgages and judgments against Ament, were proved to the jury, and he himself testified to his inability to pay the note, and that it could not be collected by process of law.

The following instructions were given to the jury on the part of the plaintiff:

1. The jury are instructed that if they believe, from [*288] the evidence, that Edward G. Ament was a householder, and had a family with which he resided from the 1st day of September, A. D. 1862, until the 26th day of December following, then he was by law entitled to the following property as exempt from sale on execution during that time, to wit: *First*, Necessary beds, bedsteads and bedding; the necessary utensils for cooking; necessary household furniture, not exceeding in value $15; one pair of cards, two spinning wheels, one weaving loom and appendage, one stove and the necessary pipe therefor, being in use by Ament's family. *Second*, One milch cow and calf, two sheep for each member of his family, and sixty dollars worth of other property suited to the said Ament's condition or occupation in life, to be selected by him. *Third*, Necessary provisions and fuel for the use of the family of the said Ament for three months, and the necessary food for the stock above exempted from sale. And also the homestead of the said Ament, not exceeding in value $1,000. And the jury are instructed that, in arriving at the value of property in the possession of Ament between the 1st day of September, 1862, and the 26th of December following, they shall exclude from their computation of value the value of the exempted property.

2. If the jury believe, from the evidence, that the plaintiff instituted a suit in the Circuit Court in the county in which Edward G. Ament resided, on the note in controversy, at the first term of said court after which the note matured, and prosecuted said suit to judgment against said Ament with all reasonable diligence, and that after said judgment was obtained, the plaintiff, with reasonable diligence, caused an execution to be issued out of the said court on said judgment, and placed the same in the hands of the sheriff of that county, then if the sheriff was unable, during the life of that execution, to find property to satisfy the same, or any portion thereof, belonging to the said Ament, then the plaintiff is entitled to recover, unless the jury believe, from the evidence, that Ament during that time had property out of [*289] which to satisfy the same, over and above that which was exempt by law.

3. The jury are instructed that a debtor, in failing circumstances, has the right to select which of his creditors he will pay or secure; and if they believe, from the evidence, that Ament, on the 3d day of September, A. D. 1862, executed chattel mortgages to Matlock, Leopold and Morgan, and in August of that year one to Johnston — to secure a *bona fide* indebtedness to each — which mortgages were recorded in the recorder's office of Kendall county prior to the judgment of the plaintiff against him, then they became a prior lien upon the property contained in the

mortgages over the plaintiff's judgment or execution which might have been issued on the same.

4. The jury are instructed that, to constitute a delivery of a deed, it is not necessary that it should be to the grantee mentioned in the deed, but it may be to a stranger, and the grantee's acceptance will be presumed under the following circumstances:—If the deed be beneficial to the grantee—that the grantor parted with all control over the deed—and that the grantor, at the time of the delivery, by declaration, intention or intimation, declares it to be for the use of the grantee, and that the grantee has eventually accepted the deed. Then if the jury believe, from the evidence, that Edward G. Ament delivered the Leopold Matlock and Morgan mortgages to the witness, McKinney, upon the occurrence of the above circumstances, the delivery is good, and the mortgages on that question can hold the property.

5. The jury are instructed that the plaintiff in his attempt to collect the note of Ament he was not required to use the greatest amount of diligence possible, but only ordinary diligence, such as is used by a careful, vigilant and prudent man in the conduct of his own affairs.

6. The jury are instructed that if any of Ament's property was in Ogle county at the time the execution was in [*290] Sheriff Ladd's hands, and so remained during the life of the execution, then the plaintiff was excused from attempting to collect his debt out of that property while it so remained in Ogle county, unless the defendant has shown that the plaintiff knew of its whereabouts.

7. The jury are instructed that the interest of Ament and the chattel mortgages in question could not have been seized and sold on a subsequent execution as against the interest of the mortgagee therein mentioned, if they believe them, from the evidence, to be valid and *bona fide*, and were given in good faith to secure a *bona fide* debt.

To the giving of these instructions, the defendant, by his counsel, then and there excepted, in general terms, without specifying wherein the instructions were wrong.

And the defendant, by his counsel, asked, and the court gave, the following instructions:

1. The plaintiff was bound to prosecute his suit against the maker of the note, with reasonable diligence, not only to judgment but to satisfaction; and if he has failed to use reasonable diligence, he cannot recover.

2. The intention of the law is, that the amount shall be made from the maker of the note if by reasonable diligence that can be done.

3. Reasonable diligence means such diligence as a prudent man would exercise in the conduct of his own affairs.

4. If, for the want of such diligence, the money is not collected of the maker, it is designed that the loss should fall upon the holder of the note.

5. If the jury believe, from the evidence, that the chattel mortgages in question were made and recorded at the same time, and in the absence of all the mortgagees, and if they further believe, from the evidence, that some of the chattel mortgages were made to persons to whom no debt was due, and some of them wholly upon property to which the mortgagor, Ament, claimed no title whatever, and all delivered to the recorder [*291] at the same time, these facts may be properly considered by the jury in determining whether or not the intent of Ament in making them was fraudulent, and if they find his intent was fraudulent and wholly for the purpose of hindering and delaying creditors, then the property described in them would not be in any way protected by them from the execution of the plaintiff.

6. If the jury believe, from the evidence, that the maker of the note, Edward G. Ament, had property in possession of value beyond incumbrances upon it, the mere obtaining of a judgment against said Ament, and placing an execution in the sheriff's hands, is not sufficient diligence, where there has been no levy or sale, but it was the duty of the plaintiff to have the execution levied upon such property, and to have it offered for sale, and if any others set up claims to it, it was the duty of the plaintiff to contest such claims, and if he fails to do so, he is bound to show that the incumbrances were valid and that nothing could be realized on the property to apply on his execution, and if he has not done so, the law upon that point is for the defendant.

7. If the jury believe, from the evidence, that the plaintiff, by reasonable diligence, might have known of property of Edward G. Ament, the maker of the note, not exempt from execution, sufficient to satisfy the debt at the time the execution was in the sheriff's hands, the plaintiff cannot recover in this case.

8. Although the jury believe, from the evidence, that executions in the other cases against Edward G. Ament were returned "no property found," such returns would not, so far as this case is concerned, prove that Edward G. Ament was at the time insolvent, or that proceeding by due diligence in this case would have been unavailing.

9. The jury are instructed that a sheriff's return on an execution is only *prima facie* evidence of the statement therein contained, and may be contradicted by other evidence.

10. If the jury believe, from the evidence, that the [*292] sheriff called on Edward G. Ament while he had the

execution against him, in favor of the plaintiff, Hiram Goodwin, and asked for property on which to levy, and if they further believe, from the evidence, that Edward G. Ament falsely and intentionally denied that he had any property on which the same could be levied, and if they further believe, from the evidence, that the said Ament then had property not specifically exempt from execution, and kept it out of the way of the sheriff, and falsely denied having it to the sheriff, then, in the law, he was not entitled to any of the benefit of the law exempting property from execution, and the sheriff would have been justified in levying on the same.

11. The executions given in evidence were not kept by the sheriff during the full life of the same before the commencement of this suit, and are not, therefore, of themselves *prima facie* evidence of the insolvency of Ament, the defendant in the execution.

12. If the jury believe, from the evidence, that any of Ament's property was in Ogle county at the time of the placing of the executions in the hands of the sheriff, yet if the same was returned to Kendall county before the 24th day of December, 1862, it was bound by the execution from the time of its return to Kendall county.

These were all the instructions given in the case for plaintiff or defendant.

The defendant asked the court to give the following instructions, which were refused:

If the jury believe, from the evidence, that the chattel mortgages given in evidence were made in the absence of the mortgagees, and without their knowledge or request, and if they further believe, from the evidence, that the chattel mortgages were delivered at the recorder's office of Kendall county, with a direction to the recorder not to record them if an execu-
[*293] tion had been issued against the said Ament, and if they further believe, from the evidence, that in case an execution had been issued, the said Ament intended to retain the control of the chattel mortgages, then the delivery of said chattel mortgages to the recorder was not such a delivery as would render them operative liens upon the property described in them.

If the jury believe, from the evidence, that the one hundred and twenty-seven acres described as follows: — N. E. $\frac{1}{4}$, S. 3, T. 36, R. 7 E. 3d P. M., excepting eight acres deeded to trustees of schools, fifteen acres deeded to Reed Ferris, eight 47-100 acres deeded to J. J. Grooms, is one connected farm and homestead owned by Edward G. Ament; that he is a householder, the head of a family, and residing with the same, and has so resided in a house on, and occupied the said described tract for the term of

over thirty years, occupying and claiming the whole as a homestead, and is now occupying the same as such, then the mortgage given to Orrington Lunt, and given in evidence, containing no waiver of said homestead, is no lien or incumbrance upon the same, and if of value over one thousand dollars, after paying other legal incumbrances upon it, it would have been liable to the plaintiff's execution, unless the mortgage was for the purchase money or improvement of the premises.

If the jury believe, from the evidence, that the chattel mortgages given in evidence were made by Edward G. Ament, not for the purpose of, in good faith, securing *bona fide* creditors, but for the purpose to hinder and delay the plaintiff, Hiram Gookwin, from collecting a judgment against him, and if they further believe, from the evidence, that the said chattel mortgages were made in the absence, and without the request of the mortgagees, and that they were never informed of the same till after the issue of the plaintiff's execution, then the said mortgages are fraudulent and void, and no incumbrance upon the property described in them.

If the jury believe, from the evidence, that some of the property mentioned in the chattel mortgage to Daniel Johnston, was in Ogle county, and some in Kendall county, and if [*294] they further believe, from the evidence, that the property mentioned in that mortgage was more than sufficient to pay the same, then the sheriff would have a right to levy on the excess over the mortgage in Kendall county and require the said Johnson to resort to the property in Ogle county to the extent of its value for the satisfaction of his mortgage.

And to the decision of the court in refusing these instructions, the defendant, by his counsel, then and there excepted.

The following are the errors assigned on the record:

The court erred in giving the instructions, and each of them, as asked by the plaintiff.

In refusing the instructions asked by defendant.

In excluding evidence offered by defendant, and in admitting evidence offered by plaintiff.

In overruling the motion for a new trial, and rendering judgment on the verdict.

The verdict and judgment are not warranted by the evidence.

Messrs. LELAND & BLANCHARD argued for the appellant, and made the following points:

If the guaranty was admissible at all, it was under the fourth count of the declaration.

The second count, if it can be called a count on the guaranty, does not state facts constituting a cause of action. In a guar-

anty of collection, an attempt to collect by suit is a consideration precedent. *Newton* v. *Harrington*, 24 Ill., 206; *Taylor et al.* v. *Ballou*, 6 Cowen, 624.

A guaranty of the collection of a note is a special contract between the parties to it, which is not assignable, so that an action can be maintained in the name of the assignee. The contract of guaranty was between Judson and Dygert. The case of *Lamoureux* v. *Hewitt*, 6 Wend., 307, was directly in point, that
[*295] the cause of action is in Dygert, not Gookwin. They contended that the law was well settled, that Gookwin could not, as assignee of the contract of guaranty, maintain an action on it. They conceded that the name of Judson, with the guaranty over it, might have authorized words of assignment to be also written over his name. In case of a mere endorsement, they said, there may be an action maintained against the endorser, without suit against the maker, but not so in case of a guaranty of collection, referring to *Taylor* v. *Binney*, 7 Mass., 479; *Hunt* v. *Brown*, 5 Hill, 145; *True* v. *Fuller*, 21 Pick., 140; *Vanduser* v. *Wright*, 6 Barb. S. C. R., 547; *Brown* v. *Gilman*, 13 Mass., 158; *Kitchell* v. *Burns*, 24 Wend., 456.

The guaranty of the note was long after its date, and Dygert could not have maintained an action, without alleging and proving a consideration. *Joslyn* v. *Collinson*, 26 Ill., 61. No consideration has been proved from Gookwin.

They argued also, that no legal diligence was shown to collect the note of Ament. They contended that Gookwin was bound to show the utmost degree of diligence in time, and if he delayed one day after the note was due, he did it at the peril of getting service for the term, or showing that issuing it earlier would have been unavailing, citing *Chalmers* v. *Moore*, 22 Ill., 359; *Robinson* v. *Olcott*, 27 Ib., 181; *Roberts* v *Haskell*, 20 Ib., 59; *Allison* v. *Smith*, Ib., 104; *Nixon* v. *Weyhrich*, Ib., 600; 2 Scam., 582; *Hilborn* v. *Artus*, 3 Ib., 344; *Allison* v. *Waldham*, 24 Ill., 132; *Joslyn* v. *Collinson*, 26 Ib., 62.

The diligence by execution, they insisted, was not sufficient.

They objected to the fourth instruction given for the plaintiff, as not containing the law applicable to the case, because it appeared that the mortgages were not accepted by the mortgagees prior to the time when the lien of the execution attached. They also insisted that the first instruction was calculated to mislead the jury, especially when taken in connection with the second. The statute does not exempt the value of the articles, but the articles themselves.

[*296] Mr. L. R. WAGNER argued for the appellee on the evidence at great length, and made these points:

That the note having been assigned by Judson, the payee, to Dygert, with a guaranty of its collection, it was negotiable under the Statute, citing *Clifford* v. *Keating*, 3 Scam., 254. He said the contract of assignment could not be severed from that of guaranty—they are one contract, and necessarily pass to each subsequent assignor without severance, citing *Heaton* v. *Hulbut*, 3 Scam., 489; *Watson* v. *McLaren*, 19 Wend., 557.

He then argued the instructions, and insisted that the first and third, asked by appellant, were properly refused.

He insisted plaintiff's first instruction was not calculated to mislead the jury, especially when taken in connection with the tenth instruction.

As to the plaintiff's fourth instruction, he contended that it was applicable to the case. The Matlock and Morgan mortgages were delivered to the recorder for the mortgagees, of which they were informed. The question of their delivery was one of fact, and was fairly left to the jury by the instruction.

He said this was not a case where courts hold that the greatest amount of diligence possible must be used. The degree of diligence was correctly stated in the instructions, citing *Wilson* v. *Van Winkle*, 2 Gilm., 684; *Rossler* v. *Morgan*, 2 Scam., 561; *Carrols et al.* v. *Litchfield*, 2 Scam., 357; *Pierce* v. *Short*, 14 Ill., 146.

Mr. JUSTICE BREESE delivered the opinion of the Court:

Two questions are presented by this record. *First*, Was the guaranty of Judson negotiable? and *Second*, Was due diligence used by the endorser to collect the note of the maker?

The note was in the following form:

$586.33. OSWEGO, 18*th Dec.*, 1857. [*297]

Four years after date, I promise to pay to the order of Lewis B. Judson, five hundred and eighty-six 33-100 dollars, at the County Clerk's Office, with interest after due at ten per cent., for value received.

E. G. AMENT.

OSWEGO, *Dec.* 3, 1858

I guarantee the collection of the within note.

L. B. JUDSON.

The first count of the declaration is upon the guaranty of the note, to which a demurrer was sustained. The second count was upon the guaranty of the note also, with an allegation of the insolvency of the maker, when the note became due, and that a suit would have been unavailing. The third count was upon the endorsement of the note, and the institution of a suit against the maker, with a return of an execution "*nulla bona*" and

inability to find property, after diligent search. The fourth was the common money count.

To the declaration, the general issue was pleaded, and a trial, verdict and judgment for the plaintiff, and the case brought here by appeal, where it is assigned for error:

1. Giving plaintiff's instructions.
2. Refusing instructions asked by the defendant.
3. Excluding evidence offered by defendant below, and admitting evidence offered by the plaintiff.
4. The verdict against the evidence.
5. Overruling the motion for a new trial.

The only points pressed upon the attention of the court by the appellant are those arising upon the instructions, separate and apart from the liability of the appellant to any judgment in this action.

No objection is taken to the declaration, but it is assumed by appellant that he is not liable to the appellee on his endorsement; that it is a special contract of guaranty, and as [*298] such, not negotiable, so that an action can be maintained in the name of the assignee.

It will be observed, the endorsement is not by a third party, but by the payee of the note, and by which he undertakes that the note is collectible. It is nothing more than an assignment of the note, without the guaranty, for by the assignment, under our Statute, the assignor undertakes that the note can be collected, and if it cannot be collected, that he will pay it. By the phrase, "I guaranty the collection of this note," his liability, as endorser or assignor, is neither increased nor diminished. *Heaton* v. *Hulbert*, 3 Scam., 489; *Childs* v. *Davidson*, decided at this term. Without the guaranty, he would be liable, under section 7 of chapter 73, to any assignee into whose hands it might come, if the assignee has used due diligence to collect the money of the maker by suit, or can show that the institution of a suit would have been unavailing. Scates' Comp., 291. The guaranty was not to Dygert, or to any one in particular, but was general.

The idea, that as the endorsement was long after the execution of the note, it is incumbent on the appellee to prove a consideration, has no force, for the reason, the endorsement is by the payee of the note. The case of *Joslyn* v. *Collinson*, 26 Ill., 61, was where a stranger, a third party, had guaranteed the note after its execution and delivery to the payees. There, proof of a consideration was held necessary, and such is the tenor of all the cases on this subject. Here the guarantor or endorser undertook no more than was imposed on him by law. He was liable under

the Statute, if diligence by suit could not get the money from the maker.

This being then nothing more than a statutory endorsement, the right of action is perfect in the assignee of the note to recover of the endorser.

On the other point, we are of opinion due diligence to collect the money of the maker has been fully shown. The diligent and honest prosecution of a suit to judgment, with a return *nulla bona*, has always been considered as one of [*299] the best tests of due diligence. It seems to us, the appellee used every means an ordinary cautious and diligent man, desirous of collecting a debt would use, to collect this note.

It was urged by appellant, that the appellee should have brought suit against the maker, when he saw him in Aurora, in Kane county. At this time he had brought suit, then pending in Kendall county, the county of the maker's residence, and had he brought another in Kane, the pendency of the suit in Kendall could have been pleaded in abatement, and he would have incurred the expense of the suit uselessly. He was not required to sue in any county, other than in the county of the residence of the maker.

The ability to pay this note and judgment thereon, by Ament, was left to the jury under a mass of testimony which we think fully justified them in finding he had no property liable to execution out of which this debt could be made.

Ament had a right to prefer creditors, and the *bona fides* of all these transactions, and all his acts to that end, were fairly left to the jury. It is possible some trifle might have been made out of the wreck of his property by extra diligence. Ordinary diligence failed to accomplish anything, and this was all to which the appellee was bound.

As to the instructions, we have examined them carefully, and are of opinion, that those asked by the defendant, and refused, are substantially embraced in those given for him. The instructions taken together, lay down the law of the case, and are so full on all the points presented, the jury could hardly have been misled by any one of them, as they had them all before them.

Perceiving no error in the record, the judgment must be affirmed.

Judgment affirmed.

[*300] THOMAS GILCREEST
v.
ALEXANDER W. MAGILL.

PRACTICE IN CHANCERY—*writ of assistance.* A writ of assistance will not issue against a person in possession of premises sold under a decree rendered in a suit to which he was not a party, if his possession began before the commencement of the suit. Not being a party, nor coming in *pendente lite*, his rights are in no way affected by the suit, and will not be adjudicated in a summary manner upon motion for a writ.

APPEAL from the Circuit Court of La Salle county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

This was an application by a purchaser under a decree of foreclosure and sale, for a writ of assistance. The facts are stated in the opinion of the court.

Messrs. BUSHNELL & AVERY for appellant.

Mr. A. W. CAVARLY for appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

One Robert Wade purchased a mortgage upon certain real estate, and at the sale under the decree, one Cleave became the purchaser. He afterwards assigned the certificate of purchase to Magill, the appellee. The latter filed an affidavit showing Gilcreest, the appellant, to be in possession of the mortgaged premises, and that he refused to surrender possession, and praying for a rule upon him to show cause. The rule was granted, and Gilcreest appeared and proved that he had taken possession of the premises under a five years' lease from Wade, before the commencement of the suit to foreclose, and had remained in possession from that time to the present. He was not a party to the bill of foreclosure. Thereupon the court made an order that he deliver the possession to Magill, from which order Gilcreest appealed.

[*301] The order was erroneously made. This same point was before this court at the Ottawa term, 1864, in the case of *Brush* v. *Farlee*. It was there held that a writ of assistance could not issue against a person in possession of premises sold under a decree rendered in a suit to which he was not a party, if his possession began before the commencement of the suit. Not being a party nor coming in *pendente lite*, his rights are in no way affected by the suit, and cannot be adjudicated in this summary manner. The order for the delivery of possession will be set aside.

Decree reversed.

Syllabus—Brief for Appellants.

SALLIE DELTZER *et al.*
v.
OTTO SCHEUSTER.

1. WIDOW—*right of, to separate property.* The right of a widow to her separate personal property, under the 48th section of the statute of wills, is not affected by her failing to renounce the benefits of a will in which land was devised to her by her husband.

2. STATUTES—*construction of.* Section 10, of chapter 34, of the Revised Statutes, must be construed to apply to other "personal estate," than that set apart to her under the 48th section of the chapter of wills.

3. WIDOW—*how separate allowance to be raised.* Although the widow is to be considered a creditor of the estate to the extent of her separate allowance, and entitled to have the real estate sold for its payment, yet if the will of the husband devise separate parcels of real estate to her and to his children, the fund for the payment of her allowance should not be raised exclusively from the estate devised to the children, but should be apportioned between that and the estate devised to her, according to their respective values.

4. HOMESTEAD. In apportioning the burden between the widow and children, the homestead, being in the occupancy of the widow, but devised to the children, should not be taken into the account or ordered to be sold.

5. APPORTIONMENT OF BURDEN. Where there is a common fund, in the hands of different parties, liable to a common burden, the burden should be equally borne.

APPEAL from the Circuit Court of Marshall county; the [*302] Hon. SAMUEL L. RICHMOND, Judge, presiding.

This was a bill in chancery brought at the October term, 1864, by children of Anthony Scheuster, against his widow for the purpose of enjoining the sale of certain real estate by her as executrix of Scheuster. The facts appear in the opinion.

Messrs. BURNS & CUMMINS submitted the following points for appellants.

The 10th section of the 34th chapter of the Revised Statutes of 1845, entitled "Dower," provides that "every devise of land, or estate therein, by will, shall bar her dower in lands, and her share in personal estate, unless otherwise provided for in the will," but she may elect which she will take, etc.

It will be seen in the 50th section, of the 109th chapter, of said statute, entitled "Wills," provides, that "The right of the widow to her separate property, shall in no case be affected by her renouncing, or failing to renounce, the benefits of the provisions made for her, in the will of her husband, or otherwise; as provided for in chapter 34, of the Revised Statutes.

This latter statute expressly repeals the statute creating the bar; so careful was the Legislature, to preserve the right of the widow, to her specific articles, (her separate property;) there is nothing left to construction or implication.

The statute bars *dower; and her share of the personal estate.*

It means nothing more than is plainly expressed; and it should not be extended, so as entirely to defeat the intention by construction.

The common law has nothing to do with the case; as the statute has fixed the rights of the parties.

There is a difference, it will be seen, between the different sections of the statute, which entitle the widow, to personal estate of her husband.

[*303] The 49th section of the 109th chapter allows her one-third of the personal estate, where there are children, and one-half where there are no children, after all the debts are paid, which is the share barred by the statute entitled Dower. The statutes giving her other personal estate denominates it her "sole and separate property," "specific articles," which of course is the property not barred as spoken of in the 50th section of the statute of Wills, above referred to.

The Legislature meant, that no trick, or device, inadvertance, or laches, and that nothing but her voluntary waiver, or disposition, should deprive her of this *sole and separate property.*

So careful were the Legislators of securing to her this right, that they allow her to take the whole personal estate; whether specific articles belong to the estate or not; and the proceeds of the sale thereof, to the exclusion of all others; and then, she for any residue of her claim, not satisfied out of the personal effects, comes in for a share of the proceeds of the sale of real estate, as a creditor, with other creditors, in the third class. 21 Ill., p. 46.

Messrs. BANGS & SHAW for appellee, submitted the following points:

1. The widow having elected to take under and according to the will, would be estopped in equity to nullify or defeat any of the devises by asserting any claim of her own, though it might be a legal one. If she could not do this directly, surely she could not indirectly. The doctrine of election would apply. *Wilbanks* v. *Wilbanks*, 18 Ill., 17.

2. If she had in her lifetime held the legal title to the property devised to the children in her own right, and the testator had devised it to the children, and made other provisions for the widow, which she accepted, she could not insist on her legal title against the children. Ibid.

3. Although it were true that the claim for specific property was not defeated by her failure to renounce under the will, yet it could not be enforced in such a manner as to defeat the provisions of the will.

[*304] Mr. JUSTICE LAWRENCE delivered the opinion of the court:

Anthony Scheuster died in 1861, leaving his widow, Sally Scheuster, now Sally Deltzer, appellant herein, and his two minor children, Otto and Edward, appellees. By his will he devised a certain lot in Henry, Illinois, to his widow, and certain other lots to his children. The personal property was valued at $151.50, by the appraisers. The County Court allowed $740.50 to the widow as her separate estate. She qualified as executrix of the will, and having taken a part of the personal property at its valuation, to apply on her allowance, then procured an order from the County Court for the sale of that portion of the real estate devised to the children, to raise a fund for the payment of her allowance and of a small amount of indebtedness found against the estate. The children filed their bill in chancery to enjoin the executrix from making this sale, and on the hearing, the court made the injunction perpetual. The executrix has brought the record to this court.

We have no doubt that the complainants in this bill were entitled to some relief against the order of the County Court, but not to the extent allowed. The 50th section of the statute of Wills provides, as plainly as language is capable of doing, that "the right of the widow to her separate property shall, in no case, be affected by her renouncing, or failing to renounce, the benefit of the provisions made for her in the will of her husband or otherwise, as provided in chapter thirty-four of the Revised Statutes." In the face of this explicit provision, it is impossible to say that the appellant lost her right to the separate property allowed to her, because she did not renounce the provisions of the will in her favor. Section 10, of chapter 34, of the Revised Statutes must be construed to apply other "personal estate" than that set apart to her under the 48th section of the chapter of Wills.

In the case at bar, the appellant, as settled in the case of *Cruce* v. *Cruce*, 21 Ill., 46, is entitled to be regarded as a creditor to the extent of her separate allowance, and to have the real estate sold for its payment. It would, however, be ob- [*305] viously inequitable to require, as the County Court did, by its decree, that the fund should be raised exclusively from the real estate devised to the children. The debts or claims against the estate are a common burden, and in equity, must be borne by all the property devised by the deceased. To permit the widow to hold the lots devised to her by the will, and to sell those devised to the children for the payment of her statutory allowance, would be to permit her wholly to defeat the purposes of the testator. If she claims benefits from his will, she must respect those designed to be bestowed upon others. It is enough to say, however, that here is a common fund in the hands of different parties, liable to a common burden, and the burden must be equally

borne. Equality, here, is equity. The court below will ascertain the comparative value of the real estate within its jurisdiction devised to the widow, and that devised to the children, and apportion the indebtedness of the estate, including the widow's allowance, according to the respective values of the property devised. The homestead, however, which, as we understand the record, was devised to the children but is occupied by the widow, will not be considered in the valuation, or subjected to the sale.

We are also of opinion that the appellant, acting as executrix, did not fairly disclose to the appraisers, all the personal property belonging to her husband. We allude especially to the liquors in the cellar, and which were taken by her at their valuation. The Circuit Court will therefore determine, by reference to the master, or by hearing testimony, the value of the property which came to the hands of the executrix and was appropriated by her at its valuation, and charge her with the actual value thereof. The court will also take an account of the rents and profits received by her on the property belonging to the children, allowing her such credits against these rents and profits as she may be entitled to, growing out of the expenses of the children.

Decree reversed.

[*306] ACHSHAH DUNNING *et al.*

v.

WILLIAM H. DUNNING *et al.*

1. IN PARTITION—*whether the petition should be sworn to—and herein, within what time the objection must be taken.* In a suit for partition of lands, after answer filed, decree for partition had, commissioners appointed, their report approved, a sale of the land ordered, the yearly value of the dower of the widow assessed, and a sale of the lands made by the Master in Chancery it is too late to object that the petition was not sworn to. If made at the outset, and before answer filed, it might prevail.

2. APPEARANCE—*waives necessity of service of process.* The fact that the defendants were not served with process, is unimportant, if they appeared by attorney.

3. DECREE—*need not be signed by the judge.* The judge, rendering a decree in such case, is not required to sign his name to it. The entry of the decree on the record, by the clerk, gives it validity.

4. PRACTICE—*when to object for want of bond for costs.* The objection, that no bond for costs was filed, the plaintiff being non-resident, comes too late after answer filed, and if not made at the proper time, it will be considered as waived.

5. NOTICE—*on motion to set aside proceedings in partition.* On a motion to set aside such proceedings, it is indispensable, that the purchaser at the sale in partition, should have notice thereof.

WRIT OF ERROR to the Circuit Court of Iroquois county; the Hon. CHARLES R. STARR, Judge, presiding.

This was a motion in the Circuit Court of Iroquois county, at

the June term, 1863, to set aside the sale of certain lands made by order of that court, in a suit for partition.

The reasons assigned in support of the motion were:

1. Because the petition was not sworn to before the same was filed.

2. Because there never was any process issued or served on the defendants.

3. Because their appearance was never entered in said cause by their authority.

4. Because the decree of the court that purported to [*307] have been made by said court never was signed by any one purporting to be acting as the judge of said court.

5. Because the complainants in said petition are non-residents of the State of Illinois, and that no bond was filed for costs, as required by law.

6. Because the petitioners have not all sued in the proper title or style.

7. Because the court had no jurisdiction over the persons of these defendants.

8. Because the attorneys that entered the appearance of the said defendants had no right or authority to do so.

Affidavits and counter affidavits were read on the motion, and it was denied by the court.

The following affidavits were read in support of the motion, at the November term, 1863:

George R. Dunning says he is one of the sons and heirs at law of deceased; that William H. Dunning and others, filed this petition for partition for the division of lands described in petition; and that this affiant was made a defendant in the cause. He admits that A. B. Roff and Kinney filed answers for defendants and waived service of process; and that Kinney and Roff had no right or authority to enter their appearance or waive service of process from this affiant or any of the defendants in the cause; that they never employed him or either of them; and that the lands are worth $25 per acre.

Margaret King says that she is a daughter of deceased, and one of the defendants in the cause; that Kinney and Roff, attorneys, did file answers to the petition for defendants at the June term, A. D. 1863; but denies that she or any of the defendants, to her knowledge, ever employed or authorized Roff or Kinney to enter her appearance and to waive service of process on this affiant or either of the defendants.

Oren King says that he is the husband of Margaret [*308] King late Margaret Dunning, and that he is one of the defendants; that the lands are worth $25 per acre; and that Kinney and Roff had no authority to enter his appearance for either of

the defendants; and that he, or either of them was never employed in the cause. This affiant says that in conversation with Roff, he (Roff,) stated that he entered his appearance through mistake.

A. G. Willard says that he is well acquainted with the lands, and believes the same to be worth $25 per acre; and that there are about four hundred and sixty acres of land.

Samuel Warrich says that he is well acquainted with the farm; that he believes the lands to be worth $25 per acre; that there are about four hundred and sixty acres of land.

On the 19th day of February, 1864, there were filed in support of the motion, the affidavits of *Walter Noble*, *Amos O. Whiteman*, *John C. Noble*, and *George P. Ketchum*, going to show that the lands named in the petition were worth $25 per acre, and that the same could have been divided without any damage to the farm, or to the injury of the heirs.

At the March term, 1864, the affidavits on the part of the plaintiffs in the motion, of Achshah Dunning, was read, denying she employed Roff and Kinney to enter her appearance, or the appearance of any of the defendants, and the waivers of process on the part of the defendants.

William H. Dunning stated in substance, that a few days previous to the June term, 1863, of the Circuit Court, he came from his residence in Wisconsin, to Middleport, Iroquois county, to take some proceedings for himself, and the complainants for whom he was acting in the premises, for the partition and assignment of dower to Achshah Dunning, the widow, in what was known in that county, as the "Dunning Farm"—that a few days before the sitting of the court at the June term, he called on the widow and Margaret King, two of the defendants in the partition suit, to make some arrangements about a partition and the assignment of dower for the widow in that farm; that he
[*309] told them, that he wished it done at the coming June term; that they both objected to taking any steps to have the dower set off, alleging it would damage the sale. The widow remarked, that she was old and did not wish to live on the farm, and would not if the farm was given to her, but they both stated they were willing, and anxious to have the farm sold, provided the widow could have in money, the portion to which she was entitled, in lieu of dower. We then proposed to them to make a mutual arrangement to get a sale of the farm, and if it could be effected, the widow to have an annuity or money in lieu of her dower, and to expedite the business and save costs, he proposed to proceed at once and get a decree at the coming June term. This they all agreed to, and agreed also, to employ attorneys and waive all process and come into court the next June term, and

obtain a decree as proposed, provided that George R. Dunning, a son of Achshah, and brother of Margaret, and one of the defendants, was willing, and would assent to the proposed proceeding; and he further said that the next day, or the next day but one, he went to see Geo. R. Dunning and Oren King, the husband of Margaret, also one of the defendants whom he did see, and each expressed himself willing and was desirous that matters should be mutually arranged and proceedings had as the said Achshah Dunning, Margaret King, and he, had before agreed. In pursuance of such arrangement, George R. Dunning proceeded at once, with affiant to take counsel, and George did counsel with Asa B. Roff and George B. Joiner, and said he had employed Asa B. Roff to appear for himself, for Achshah Dunning and for Margaret King; and further said they would go on at the June term of court, as proposed and agreed upon; he further said that a few days after, he called on these parties, and told each of them it would be necessary for them all to go to Middleport and appear, or give their consent to the arrangement which they had made, to which Achshah and George agreed, and they both went to Middleport with him, but Margaret said she could not well go, but would agree to anything Achshah and George should do in [*310] the business; that George also, at that time, when at Middleport, informed him, that he had employed Asa B. Roff, attorney for himself and Achshah, and Margaret; he further said the suit could now be got up and the parties could go ahead with it, whereupon he called upon Roff, who also said he was employed as attorney in the cause; and he further said that Roff did appear in the cause, as also Chester Kinney on the part of the defendants with Roff, and he further said that George R. Dunning and Oren King, both appeared before the jury in the cause, of which C. F McNeil, Master in Chancery had charge, by order of the court, when evidence was brought and witnesses sworn as to the amount of annuity which the widow should receive in lieu of her dower, at which time Roff and Kinney were present, and George, and Oren King took an active part to have the amount of the annuity settled to correspond with their wishes and feelings. He also said that George R. Dunning and Oren King, were both present in court when the decree in the case was being settled, and that George particularly interested himself in the decree, which was finally settled to suit him; and he further says that George, and Oren King were both present at the public sale of the farm which was sold under the decree of the court, that they both interested themselves at the sale to get bidders, and to have the farm sold at a good price, and that neither of them made objections to the sale; he also says further, that he had a conversation with Margaret King the day before the farm was sold by C. F. McNeil, Esq.,

commissioner, who made no objections to the sale, but she stated that she had understood Dr. Fowler and Charles Sherman had intended to bid on the farm; that they owned land on each side of it, and if they bought it they would divide it to suit their convenience; he further said he was at the house of Oren King the day after the sale of the farm and heard him remark to his wife, Margaret King, that Mr. Wright, the purchaser of the farm, wished to negotiate, and buy up the back payments at 10 [*311] per cent. discount, and Margaret said she would not negotiate, but that she preferred that the payments should be secured by a mortgage on the farm, and have her interest; and he further said that Dr. Fowler and Charles Sherman both bid on the farm at the public sale, and also, that at least one other person, bid on the farm at the sale to his knowledge, and also that others bid as he was informed and believes.

A. B. Roff stated that he, together with one Kinney, acted as the attorneys for defendants at the June term, that Oren King, George R. Dunning and Achshah Dunning, spoke to, and counselled with him, and he believed from the conversation, that he was employed as the attorney in the cause for all of the defendants, and he, together with Kinney, entered the appearance of all the defendants; that he employed Kinney for defendants.

Juliet Boutwell said she resides in the State of Wisconsin; that she was acquainted with the defendants; that she came down on a visit in November, 1863, to the residence of defendants; she heard each of them say that they became willing parties to the suit, for the purpose of having the lands sold; she further said that George R. Dunning said, that he intended to bid $18 per acre at the sale.

Robert Carr said he had been well acquainted with the farm for twenty years; that $15 per acre, with the annuity of $225, was a good price for it; that Mrs. Dunning is a healthy, active woman; he, with George Pineo, went on the premises for the purpose of setting off dower for the widow; and at that time the widow stated that she did not want her dower set off, but would rather sell the whole place, as it would injure the sale of the premises; that she would rather have a money annuity in lieu of dower.

George Pineo said that he, with Robert Carr and Micajah Stanley, were appointed by the court to examine the farm, and set off dower to the widow; that he and Carr went on the premises during the June term of the court, 1863, and informed [*312] the widow of their purpose there, and she told them that she did not wish her dower set off but preferred it in money, or annuity, in lieu of dower. He heard Dunning and King say after the decree, that they were well satisfied with the

proceeding and with their attorneys, Roff and Kinney; and he was well acquainted with the lands, and that $15 per acre was a fair price, with the yearly annuity of $225 to the widow.

C. F. McNeal stated that he was present at the trial of the cause, and had charge of the jury that found the yearly annuity for the widow in lieu of dower; that Geo. R. Dunning and Oren King, two of the defendants, were present and consulted with attorneys; that he was appointed by the court, commissioner to sell the lands; that he gave notice of sale four weeks in a newspaper of the county; that he sold the lands on the 10th of November, 1863, at 2 o'clock P. M.; all of the lands were bid off by George S. Wright — subject to widow's annuity of $225 — at $15 per acre; that Geo. R. Dunning and King, had personal notice from him of the time of sale, and were both present at the sale; that, under all circumstances, the lands sold for all they were worth; he said he wrote a letter to King and Geo. R. Dunning, informing them as to the time of sale, and also consulting them as to the sale.

George S. Wright says that he purchased the lands described, on or about the 11th day of November, 1863, for $15 per acre, of said C. F. McNeill, commissioner, subject to life annuity of widow, of $225; that Geo. R. Dunning and King were present at sale; he also called upon them to pay them the deferred payments, but they preferred to let them stand according to conditions of sale; this was the next day after the sale; he also had a conversation with widow; she expressed herself well satisfied with sale, and the amount of annuity.

George B. Joiners says that he was at the residence of widow between the June term of said court, 1863, and the sale; and, in a conversation with widow, she stated that she had beat him in the trial; that she had hired a lawyer, and she ap- [*313] peared to be satisfied; that she did not want the farm divided; that said lands are not worth more than $15 per acre.

Chester Kinney says that he was employed by A. B. Roff, Esq.; that by direction of Roff he drew up said answer on or about the 16th day of June, 1863; that he was informed by Roff, that he (Roff,) was employed in said cause; that Roff desired him to assist, and thereupon he filed said answer and waived service of process; that before filing said answer, he submitted it to Fletcher, attorney for petitioners, and Roff, attorney for defendants. They stated that it was correct; and he met King and Geo. R. Dunning in court-room, and informed them as to the nature of said answer, and they, as attorneys, followed the instructions of said King and Dunning.

Charles Sherman says that he is acquainted with said farm,

and it is not worth over $15 per acre with annuity of $225 per year for widow.

Isabella Crosier says that she resided in family of Oren King on last of August, 1863, and resided with him, about nine weeks, and she is well acquainted with widow and Geo. R. Dunning; that widow called frequently at said Kings; and that she heard, in conversation between widow and Mrs. King, that she (widow) was desirous of having farm sold without any division; that W. H. Dunning wanted to divide the lands, but they had beat him, and that it was to be sold all together; that she wanted money for her share.

Philander Morgan says that he is well acquainted with said farm, and has been since 1859 or 60; that $15 per acre is all that the farm is worth, subject to said annuity; that Geo. R. Dunning admitted to him that Kinney and Roff appeared for them (defendants,) and that the suit was then disposed of, and were all satisfied with what they done; that the said Kinney was a good lawyer.

Michael Hoyle says he is acquainted with said farm; that it is not worth over $15 per acre, with annuity.

[*314] *W. Patterson* says that he is acquainted with said farm, and that it sold for all that it was worth.

Abram Congenough says that he is acquainted with said farm, and that it is not worth over $15 per acre.

It was admitted by the judge that he did not sign the record of the June term of said court, 1863, until after defendants filed their motion to set sale aside.

The case is brought here by writ of error, and the same reasons urged for a reversal of judgment as were assigned in support of the motion.

Mr. JOHN CLARK argued for plaintiffs in error.

He referred, upon the point of appearance by an attorney, to the case of *Gardner* v. *Hall*, 29 Ill., 277; and *Frazier* v. *Rexor*, 23 Ib., 88.

As to the appointment of the commissioner, he referred to section 8, of the Partition act, Scates' Comp., 161, and also to the ninth section of the same act.

As to the report of the commissioner, he cited the same section nine.

He objected, that the oath of the commissioners and their report, were on separate pieces of paper and detached, and referred to the case of *Driggs* v. *Dickinson et al.*, 2 Scam., 437. He also objected, that the parties interested, had not, knowingly, a day in court, and cited *Lyon* v. *Britain*, 2 Gilm., 629; *Thom-*

son v. *Emmert*, 15 Ill., 415; *The People etc.* v. *Sanborn*, 1 Scam., 123.

In his objection to the report and order of sale, he cited *Tibbs* v. *Allen*, 27 Ill., 119, and as to the omission of the judge to sign the order, he referred to *Klemm* v. *Dewes*, 28 Ib., 318.

Mr. GEORGE B. JOINER and Mr. JAMES FLETCHER argued on the part of the defendants in error, and in reply, contended that the appearance by attorney, and filing answers, was a sufficient appearance, citing 6 Johns. R., 302; 7 Iowa, 320, and 30 Verm., 285. They also contended, that the whole proceedings were amicable, and that setting them aside, [*315] at this late day, would work great injury to the purchasers, who purchased ignorant of any objections.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was a motion in the Circuit Court of Iroquois county, to set aside a sale on partition, and all the orders made in the cause.

The suit was for the partition of the land of Eben Dunning, and filed by a portion of his heirs at law against the widow and the other heirs at law. The defendants duly appeared and filed their answers to the petition, and such proceedings were thereupon had, that the court decreed a partition of the lands and appointed commissioners for that purpose, with directions to set off the widow's dower in the lands. At the same term the commissioners reported the land could not be divided without prejudice to the owners, whereupon an order was made for a sale of the land and a jury was impaneled to inquire of the yearly value of the widow's dower, and to allot the same to her, instead of a portion of the land. The jury assessed the yearly value of the dower at two hundred and twenty-five dollars. A sale was made by the Master in Chancery of the land, subject to this allotment to the widow, which was approved by the court.

A motion was made to set aside all the proceedings, which the court denied.

Many reasons were assigned as grounds of the motion, all which, it is not necessary to notice. The one most important is the first; that the petition was not sworn to as the statute requires. This objection would have prevailed, doubtless, if made at the outset, and before answer filed. After a regular appearance by attorney, answer filed, decree had, and a sale of the premises, and the report thereof approved, this objection comes too late. It is, at most, but a dilatory motion, and must be made in apt time, which is at the earliest moment.

As to the second point, process is unnecessary in any [*316] case, where the party voluntarily appears and pleads. Pro-

cess could do no more than compel appearance, and the purpose is answered if the party comes voluntarily into court. But it is said, the attorneys who appeared for the defendants, and put in the answer to the petition, had no such authority. On this point there are several affidavits, and the weight of testimony contained in them, greatly preponderates in favor of the right of the attorneys to enter an appearance and file an answer. It seemed to be an amicable proceeding between all the parties interested. This disposes of the third objection. As to the fourth, there is no law with which we are familiar, requiring the presiding judge of a Circuit Court to sign a decree which he directs the clerk to enter. The entry of the decree on the record gives it its validity.

As to the fifth objection that the plaintiff was a non-resident and filed no cost bond, it comes too late, after answering to the merits. It is a dilatory motion, and if not interposed at the proper time, will be considered as waived. The objection cannot be made after answer or plea filed. *Trustees of Schools* v. *Walters*, 12 Ill., 154.

It is unnecessary to pass upon the other points in detail, but we will come to the eleventh, which seems to present the *gist* of the controversy. It is this. "Because the lands were sold for one-half their value." None of the affidavits show that there was any unfairness at the sale. It is admitted by all, that the whole proceeding was regular, and the sale had in the presence of two of the defendants and their attorneys, and no objections made. The evidence is quite strong, that with the yearly incumbrance of two hundred and twenty-five dollars on the land, in favor of the widow, fifteen dollars per acre was a full price for the land.

But an insuperable objection to allowing the motion, is, that the purchaser of the land had no notice of the motion. He was a party in interest and entitled to notice. Nor could the court, on the motion to set aside the sale, look into any irregu-
[*317] larities preceding the sale. There being, then, a ratification by the defendants of the acts of the attorneys, Roff and Kinney, if not an implied original authority to enter their appearance, and the court having thus jurisdiction of the defendants, we do not feel authorized on this motion, to go back of the decree of sale.

On the merits of the controversy, the whole case shows that the proceedings for partition and for an allowance to the widow, were of that amicable character, at the start, families often enter into, but which sometimes terminate, as this has done, in an expensive law suit.

The judgment, on the motion, must be affirmed.

Judgment affirmed.

EDWIN T. PECK
v.
ELMIRA H. BLIGH *et al.*

1. CONSIDERATION—*recoupment of damages.* An agent, for the purpose of procuring subscription to the stock of a railway company, upon taking from a subscriber a note for his stock secured by a mortgage, gave to him an instrument by which the company guaranteed him against loss upon his stock. The agent was authorized by the board of directors to execute such an instrument. After the stock became entirely worthless, the complainant filed a bill to foreclose the mortgage. The defendant filed an answer and a cross-bill, setting up these facts, and praying a cancellation of the notes and mortgage. *Held*, that the defense would have been good against the company, and the relief prayed by the cross-bill allowable, and that as the complainant claimed the note and mortgage under an instrument which did not operate to transfer the legal title to him as an assignee under the Statute, he occupied the same position as the company.

2. PROMISSORY NOTE—*assignment of.* A note for railway stock, payable to the president of the road individually, and not in his official capacity, can be assigned, so as to give the holder the rights of an assignee, only in his name. In no other way can the legal title pass.

3. SAME. In such a case, a bond executed by the company, under its corporate seal, and purporting to guarantee to the holder thereof the payment of the note at a different time and place from those specified in the [*318] note itself, and also providing that the note shall be transferred only in connection with the bond, is not such a guaranty of the note as will pass the legal title, and cut off the equities of the maker. The bond is the principal instrument in the hands of the holder, and the note but the incident. The assignment is qualified, and should put purchasers on their guard.

SAME. The only assignment which will cut off the equities of the maker of the note is one made in conformity with the Statute, and passing the legal title.

APPEAL from the Circuit Court of Winnebago county; the Hon. B. R. SHELDON, Judge, presiding.

This was a bill in chancery to foreclose a mortgage, filed December 5, 1860. The facts fully appear in the opinion.

Mr. STEPHEN R. MOORE, for the appellant, submitted the following points and authorities:

This is a bill in chancery to foreclose a mortgage executed by Alpha Bligh and wife, to Henry S. Durand, upon lands in Winnebago county, dated May 12, 1855, to secure note of $3,000, payable in five years from February 10, 1855.

The defense insisted upon is, that Bligh received in payment for the note and mortgage, thirty shares of the Racine and Mississippi Railroad Stock, which has since become worthless, and which the heirs of Bligh now offer to surrender to plaintiff, in satisfaction of the note and mortgage.

It is settled beyond controversy that the Racine and Mississippi Railroad Company have a right to receive notes and mortgages for cash installments of their stock; (nor has this been denied in this case,) and that the securities are valid and will be en-

forced against the maker. *Clark* v. *Farrington*, 11 Wis., 307; *Blunt* v. *Walker*, 11 Wis., 335; *Cornell* v. *Hichens*, 11 Wis., and the numerous authorities there cited.

The note and mortgage were purchased by plaintiff in due course of business, before maturity, for a valuable consideration, the note and mortgage giving no notice for what the notes were given, and no proof is given that plaintiff knew of any [*319] equities, hence no defense which might have existed between the original parties can defeat this action. Story on Bills, 220; Chitty on bills; Parsons on contracts, vol. 1, 213, and cases cited in note.

While in a court of law, in a suit brought on the note, it might be necessary to transfer the note by endorsement, yet it is not so in a proceeding in equity, to foreclose the mortgage. The plaintiff took an equitable interest, which interest will be protected by the court. *Morris Canal and Banking Co.* v. *Fisher;* Am. Law Register, vol. 3, 425; *Mercien* v. *Cotten*, 34 Miss., 64.

The court will look at the intention of the parties to the original contract, and enforce that intent, which was to enable the Racine and Mississippi Railroad Company to raise money to build their road, and the notes and mortgage were designed by the parties to be put in the market and sold, and, like all bonds, payable to bearer, to pass the title by delivery. The note and mortgage is in the nature of a bond, and so intended, by the parties, when it was made, and millions of dollars are daily invested in these and similar securities, and it would be doing a violence to every principle of justice to permit the maker to put them on the market, knowing the manner they would be bought and sold, and when sued in the hands of *bona fide* holders, to hold this defense good. It would enable a party to take advantage of his own wrong. *Daniel P. Crosby* v. *Samuel M. Romb et al.*, decided by the Supreme Court of Wisconsin in 1863.

The guaranty of the Racine and Mississippi Railroad Company, attached to said note and mortgage, can, in no wise, diminish the legal liability of the maker to pay his obligation. It stands in the nature of additional security to the holder of the note and mortgage, but can, in no wise, diminish Bligh's liability.

The doctrine of recoupment does not apply here. The note was made payable to Henry S. Durand. He gave Bligh thirty shares of railroad stock for it, which was then worth [*320] $3,000, or whether it was or was not, makes no difference, as Bligh received it. The proof shows the stock became valueless in 1859. There was no failure or want of consideration in the original transaction, but that subsequently the value of the consideration had depreciated. Suppose the note and mortgage

had been given for city lots. Lots were high then, subsequently the city does not grow, and the lots become worth one hundred dollars. Will it be contended that in a suit on the note and mortgage the difference between the value of the lot when the note was given and when the note is sued, can be recouped? Clearly not. Bligh holds the railroad stock, until it becomes worthless, which is his misfortune. The remedy for the maker of the note to pursue, is to sue the Racine and Mississippi Railroad Company on the guaranty. He made the note and mortgage, and put it in the market, for the purpose of raising money, knowing it would be used, and he relied upon his guaranty for his protection against loss, and he must pursue his remedy against those who indemnified him. The value of the stock, at the time the note was made, is the true criterion to determine the question of failure or want of consideration, and the court clearly erred in receiving evidence of its value when suit was commenced. For these reasons, the judgment of the court should be reversed.

Messrs. LATHROP & BAILEY, for appellees, submitted the following points and authorities.

The note and mortgage for the stock, and the indemnity or guaranty of R. R. Co. against loss on the stock, and its promise to pay interest on the note until maturity, were made at the same time, and together constituted one transaction; and in fact, only entitled the mortgagee, or the railroad company, to collect of the mortgagor on the note and mortgage, the cash value of the thirty shares of stock.

And as no action could be brought on the note and mortgage until maturity, that was at least the earliest period when the parties could have investigated the extent of Bligh's [*321] liability to pay, and at that time the stock was worthless, and has so remained.

And from the certificate of stock, it is apparent that Bligh was to have no real interest in the stock until payment of the note.

This transaction clearly shows that the guaranty made to Bligh was intended to balance against his obligation to the railroad company (or Durand, its trustee,) on the note and mortgage, and to protect Bligh from paying anything more than the actual value of the stock when the day of payment arrived; the railroad company assuming all risk of value of stock.

And to deny the defense in this action would not be enforcing the contract the parties made, but giving to it an entirely different effect from that intended, and imposing upon the defendants liabilities not contemplated by either party, and which they had done their utmost to avoid.

In *Charles Schuchmann* v. *Jacob Knoebel exr.*, &c., 27 Ill., 178, Justice BREESE says:

"There is a natural equity as to claims arising out of the same transaction, that one claim should compensate the other, and that the balance only should be recovered."

And the same doctrine is laid down and enforced in 2 Story's Eq., Jur., sec. 1433, and subsequently.

The defense under the guaranty goes directly to impeach the demand upon which this suit is brought by showing that it never did in fact exist, and is within the principle of the case. *Piggott* v. *Williams*, 6 Madd. R., 95, cited in note to sec. 1436 of Story's Eq. Juris., where the solicitor was attempting to enforce a demand for services, and the defense was the negligence of the solicitor in the performance of the services; and this seems to have been allowed as an equitable set-off.

[*322] Had an action at law been brought to recover the mortgage debt, there could be no doubt of the right to set-off or recoup the damages under the indemnity or guaranty to Bligh, inasmuch as they all arose out of the same transaction. *Batterman* v. *Pierce*, 3 Hill, 171; *Read* v. *McAllister*, 8 Wend., 110; *Stow* v. *Yarwood*, 14 Ill., 424; *Babcock* v. *Trice*, 18 Ill., 420; *Schuchmann* v. *Knoebel*, 27 Ill., 185; *Sanger* v. *Fincher*, 27 Ill., 346.

And if we have no stronger claim, the maxim, "equity follows the law," would seem certainly to entitle us to as full a measure of relief as we should have had in a court of law, and had an action been brought there, to have recovered the same claim.

But the doctrine of recoupment came from the courts of equity, and "is in its nature and essence an equity doctrine." 2 Kent, 472, 473 and notes; also note A, 8 Wend., 110. And strange, indeed, would it seem, should the doctrine be found less efficient in a court of equity than in a court of law.

Messrs. LELAND & BLANCHARD, on the same side, submitted the following points:

The question is whether these damages, occasioned by the breach of said contract, guaranteeing Bligh *against any loss whatever upon said thirty shares of stock* could be set off or *recouped* in the suit to collect the mortgage money by foreclosure and sale of the premises. There was also a question as to whether there was a homestead right, and also as to the rate of interest. As this proceeding is one to obtain a judicial or forced sale, and not an exercise of the power voluntarily conferred, we claim that in this case, as it now stands, the Statute in relation to homesteads does apply. The interest should be no more than six per cent. in any event, and if the ante-dating the note was so that it should

draw more than the legal interest, no interest at all should be allowed.

As the complainant is not the representative of one who [*323] was the holder of the note and mortgage, by assignment under the Statute, it is clear that the same defense can be made as though the mortgagee himself had filed the bill, and even if there had been a written assignment, the complainant in this proceeding occupies no better position than the mortgagee would have done. *Olds* v. *Cummings*, 31 Ill., 188.

It was the duty of the purchaser of the mortgage to have inquired of the mortgagor whether there was any reason why it should not be paid.

Under our Statute, in relation to set-off, this claim for unliquidated damages would seem to be properly called a set-off against the note if an action at law had been brought upon it, and by the 3d section of chapter 21 of our Statute in relation to chancery, (Purple Stat., p. 139,) it is provided that a set-off shall be allowed in chancery, in suits for the recovery of money, in the same manner and with like effect as in actions at law. The cases of *Edwards* v. *Todd*, 1 Scam., 463; *Nichols* v. *Ruckhells*, 3 Scam., 300, and *Kaskaskia Bridge Co.* v. *Shannan*, 1 Gilm., 15, establish the position, that the defense would have been a good one.

This, therefore, would have been a good defense in chancery, without the necessity of a resort to a cross-bill, and if there was no claim in equity and good conscience to recover any portion of the mortgage money, the bill should have been dismissed on a hearing upon original bill, answer, replication and proof, and a decree dismissing the bill would have amounted to a discharge of the mortgage by barring another suit for the same cause of action.

The cross-bill was, however, a proper measure of precaution in order to obtain the affirmative relief of a decree, canceling and discharging the mortgage.

The phrase "set-off," however, is not as peculiarly applicable to the case as "recoupment," which is an expression rather more appropriate in a court of equity, and is in its nature and essence an equity doctrine, and as set-off, which is also a [*324] doctrine which originated in equity, is more appropriate when there are two transactions, and recoupment, when the defense grows out of the same one, by cutting down the plaintiff's demand, by proof of some equitable cause, why he should not have it all, or any part of it. See Sedgwick on the measure of damages, p. 456.

However, it does not matter about the name we give things. The authorities cited clearly establish the right to resist a decree for the money mentioned in the note and mortgage, by cutting

therefrom the amount of the damages sustained, and as the stock was entirely worthless when the debt matured — these damages equal the amount of the stock.

It is claimed on the other side that the depreciation of the stock at some time anterior to that when it became entirely worthless, should be the measure of damages, if we are entitled to any reduction.

The guaranty was not in relation to the value of the stock at any particular time, but was one *against any loss whatever.* It had no limit as to time. It, of course, applied to future depreciation, and if some reasonable limit is to be fixed by the law, surely no more appropriate one could be selected than that of the maturity of the promise to pay for the stock. Bligh was not to become the sole owner of the stock until then. The use of it and the right to the dividends were in the company till then, and the supposed dividends were to balance the interest on the note, which the company were to pay in consideration for its right to use the income on the stock.

What more fitting time than that of the maturity of the note for Bligh to determine whether he would pay the note in full, and redeem his stock, so as to own it in full, or pay the balance, if any, deducting his damages sustained by its depreciation? At and before this time, however, the stock became utterly worthless. The amount of the depreciation equaled the whole price, and the decree below was just and equitable, and it should stand.

[*325] The facts as stated herein are clearly and indisputably proven. The defense, if allowable, was one which totally defeats the claim of the complainant; and farther argument and authority are superfluous, on the question whether it was really necessary to pay the mortgage, and sue the utterly insolvent railroad company.

If there could be any possible doubt about applying the foregoing doctrines to the case, this fact that the railroad company is insolvent would have been sufficient to let in the defense. If otherwise, it might have been improper. *Keab* v. *McAllister*, 8 Wend., 117; *Gaylord* v. *Couch*, 5 Day, 230; *Robbins* v. *Holley*, 1 Monroe, 194; *Lindsey et al.* v. *Jackson et al.*, 2 Paige, 581; *Gay* v. *Gay*, 17 Paige, 369.

It may be a hardship upon the estate of Peck, to lose the amount paid for the note and mortgage, if what was paid was worth anything. And it is hard upon the widow and children of Bligh to lose their home. But if Peck blindly purchased, when he would not have done so, if he had inquired of Bligh about the circumstances, his representatives must sustain the loss, and not those of Bligh, who took the precaution to protect them against loss by a written contract.

The law protects the vigilant, and not sleeping, as Providence protects the strongest battalions.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

This was a bill in chancery to foreclose a mortgage, filed by the administrator of William Peck, against the widow and heirs of Alpha Bligh. The mortgage, and the note secured by it, were given by Bligh to H. S. Durand, who was President of the Racine and Mississippi Railroad Company, and bore date May 12, 1855, maturing in five years from the 10th of February, 1855. The bill averred, and the answer admitted, that Durand was only a nominal party to the note and mortgage, and that they were really given to the railroad company for its sole use and benefit. The complainant claimed the note and mortgage by virtue of an instrument executed by the railroad company on the [*326] 30th of July, 1855, and guaranteeing to the "holder hereof" the payment of the note, this instrument being executed upon a separate paper, and attached to the note. It appeared, upon the hearing, that Bligh subscribed to thirty shares of stock in the railroad company; that he executed the note and mortgage in payment for said stock; that one Clough was the authorized agent of the company in procuring subscriptions, and that, at the same time with the execution of the note and mortgage by Bligh, Clough, as agent for the company, executed to him an instrument in writing, reciting the transaction, and guaranteeing him against loss on the thirty shares of stock. The execution of these different instruments was all one transaction, and Clough swears that he was authorized by the board of directors to give the guaranty. The stock became utterly worthless before the maturity of the note, and these facts are relied upon as an equitable defense against the note and mortgage.

The defendants, besides their answer, filed a cross-bill, asking that the note and mortgage be canceled. The court below refused the relief prayed in the original bill, and decreed upon the cross-bill, that the complainant, Peck, and all persons claiming under him, should be forever barred from bringing an action on the note, except as against Durand or the railroad company, and that the administratrix of Bligh execute to the company an assignment of the certificate for said thirty shares of stock. The complainant appealed.

The instrument executed by Clough to Bligh, at the time the latter gave his note and mortgage, was as follows:

Whereas, Alpha Bligh has executed a note and mortgage in favor of Henry S. Durand, or bearer, bearing date on the 12th day of May, A. D. 1855, payable on the 10th day of February,

A. D. 1860, for the sum of three thousand dollars, with
[*327] interest at the rate of ten per cent. per annum from and after the 10th day of February, 1855, which said note and mortgage have been executed by him to the said Henry S. Durand, for the purpose of loaning the said sum of three thousand dollars to pay for thirty shares of the capital stock in the Racine and Mississippi Railroad Company, by him subscribed. Now, therefore, in consideration of the relinquishment and assignment by the said Alpha Bligh to the said company of so much of the dividends on said stock which the said Alpha Bligh may become entitled to as shall be sufficient to pay the interest on said note, the said company agree to pay the interest on said note and mortgage until the same shall become due; and the said company, in consideration of the premises, agree to become responsible to the said Alpha Bligh for all money so loaned by the said Henry S. Durand on said note and mortgage. Said Bligh is hereby guaranteed against any loss whatever upon said thirty shares of stock.

S. D. CLOUGH,
Agent for said Company.

Dated at Rockton, Ill., May 12, 1858.

There can be no question but that in a suit brought by the railway company to foreclose the mortgage, the defense here made would have been allowable on the ground of recoupment of damages or equitable set-off. The company, at the time of taking the note and mortgage, and as a part consideration therefor, expressly stipulated to protect Bligh from all loss on his thirty shares of stock. The stock having become worthless, Bligh, if he had paid his note, would have had a valid claim against the company for damages, and not having paid the note, could set up the damages in a suit brought by the company for its collection. The case would be precisely analogous to one in which a breach of the covenant against incumbrances in a conveyance of land is set up as a defense to a suit upon a note for which the conveyance
[*328] was given, and is as available upon the chancery as upon the common law side of the court.

It is urged, however, that the complainant in this suit is the assignee of the note and mortgage, that they were assigned before they fell due, and that this defense was thus cut off. The alleged assignment is not by endorsement upon the note, but by an instrument attached to it, and in the following form:

UNITED STATES OF AMERICA, }
STATE OF WISCONSIN. }

Racine and Mississippi Railroad Co.—Bond.

Know all men by these presents, that the Racine and Missis-

sippi Railroad Company, for a valuable consideration, hereby acknowledged, have guarantied, and hereby do guarantee, to the holder hereof the payment of the principal of the annexed promissory note and mortgage securing said note executed by Alpha Bligh to Henry S. Durand, or bearer, dated on the 12th day of May, 1855, payable in five years from the 10th day of February, 1855, with interest at the rate of ten per cent. per annum, payable annually; and said company further hereby guarantee to said holder the payment of the interest on said note and mortgage semi-annually, and both the principal and interest thereof shall be paid at their office in the city of New York, and that said note and mortgage may be transferred in connection with this bond (but not otherwise) to any party or purchaser whomsoever.

In witness whereof, the said company have caused this bond to be signed by their president, and attested by their secretary, and their corporate seal to be affixed this 3d day of July, 1855.

[SEAL] H. S. DURAND, President.

A. J. REDBURN, Secretary.

It has been several times decided by this court that a [*329] guaranty of a note by the holder amounts also to an assignment and passes the legal title. Is this instrument such a guaranty? On its face it purports to be a bond of the railway company, and while it purports to guaranty the payment both of the principal and interest of the note, it guarantees that they shall both be paid in a manner different from that provided for in the note itself. By the latter, the interest was payable annually. By this bond it is guaranteed to be paid semi-annually. The note on its face was payable in Racine, Wisconsin. By this bond it is guaranteed to be paid in the city of New York. With what propriety can one instrument be said to guarantee another, when the alleged guaranty is, not that the contract shall be performed according to its terms, but in a manner materially different? But this instrument, regarded as an assignment, is not open to these objections alone. It provides that the "note and mortgage may be transferred in connection with this bond, but not otherwise." The reason, we presume, for the insertion of this clause, is to be found in the contract between the company and Bligh. It had agreed with him, itself to pay the interest on the note, and to protect him against loss on his stock. When, therefore, it issued this bond assuming obligations different from those of the note, and providing that the note should be transferred only in connection with the bond, it must be considered as issuing the latter as an independent instrument. Instead of seeking to assign and guarantee the note, which it could have done by a few words written thereon, it clearly sought to make its own bond the prin-

eipal, and the note the incident. But whatever the object, the language referred to qualified the assignment, and was sufficient to put purchasers upon their guard.

But besides these objections to this instrument, when set up as an indorsement, there is another which is fatal, and upon which we more especially place the decision of the case. The note was in the following form:

[*330] "$3,000

Five years from the 10th day of February, 1855, for value received I promise to pay Henry S. Durand or bearer, the sum of three thousand dollars, at his office in the city of Racine, Wisconsin, for money loaned together with interest from said 10th day of February, at the rate of ten per cent. per annum, payable annually at the office as aforesaid until said principal is paid. Dated at Rockton, in the county of Winnebago, State of Illinois, this twelfth day of May, 1855.

A. BLIGH."

It will be observed that this note is payable, not to the company, nor even to Durand as its President, but to him individually, and could be assigned so as to give the holder the rights of an assignee, only in his name. In no other way could the legal title to the note pass. But the instrument relied upon as an assignment, is not the assignment of Durand. It is, and purports on its face to be, a bond of the railway company, executed under their corporate seal, attested by their Secretary and purporting to be signed by Durand only as their President. He assumes no obligations by this instrument. No action would lie against him for a breach of its covenants. It is not his guaranty, but that of the company. Yet the note was payable to him, and as he has neither indorsed nor guaranteed it, where does the complainant get his legal title, by which alone he can claim the position and privileges of an innocent indorsee of negotiable paper? He has none, and must hold the paper subject to the same equities and defenses that could be set up against it in the hands of the payee. On the common law side of the court a suit upon it could only be brought in the name of the payee, and on the chancery side, the same defense may be made as if the suit were thus brought. The only assignment which will cut off the equities of the maker of the note, is an assignment made in conformity with the statute, and passing the legal title. *Olds* v. *Cummings*, 31 Ill., 188.

[*331] The decree refusing the relief prayed in the original bill and granting that prayed in the cross-bill was proper and must be affirmed.

Decree affirmed.

JACOB SAYLOR *et al.*
v.
SETH F. DANIELS.

1. USURY. While it is the rule of this court that usurious interest once paid voluntarily, cannot be recovered back, yet that rule does not apply where the transaction has not been settled, and the lender brings his action for the recovery of an alleged balance. In such case the borrower may defend by claiming a credit for whatever usurious interest he has paid in the same transaction. The fact that new notes have, from time to time, been given does not change the case.

2. ASSIGNEE—*rights of, in note tainted with usury.* If a note tainted with usury is assigned by the payee to a creditor as collateral security for a pre-existing debt, he is a holder for a valuable consideration, but only to the extent of the debt due him. The same defense may be made to the residue of the note as if it had not been assigned.

APPEAL from the Superior Court of Chicago.

This was an action of assumpsit brought at the January term, 1864, upon a promissory note to which was set up the defense of usury. The material facts appear in the opinion of the court.

Messrs. HURD, BOOTH & KREAMER for appellants.

Messrs. GARRISON & BLANCHARD for appellees.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

This was an action brought by Daniels against Saylor upon a promissory note, to which Taylor pleaded usury. It was proven that $400 had been first loaned at 15 per [*332] cent. interest, and payments made from time to time, and new notes given, all in continuation of one transaction, the note sued on being the last. The payments made had been applied first in extinguishment of the interest, and then in reduction of the principal. The plaintiff had a verdict for $277.32

The court below refused to apply upon the existing note the payments formerly made upon the usurious interest. This was error. While it is the rule of this court that usurious interest once paid voluntarily cannot be recovered back, yet that rule does not apply where the transaction has not been settled, and the lender brings his action for the recovery of an alleged balance. In such case the borrower may defend by claiming a credit for whatever usurious interest he has paid in the same transaction. This is not using the usury law as a sword, but strictly as a shield. The fact that new notes have from time to time been given does not change the case. The court looks at the substance, not at the form. When the $400 was loaned in this case, it continued one transaction until paid, without reference to the number of balances struck, and new notes given, and until fully paid, the

borrower may insist upon having past usurious payments legally applied. *Hadden* v. *Innes*, 24 Ill., 381.

In this case the original loan was made by Barber, but when he took the last note, he took it in the name of Martin & Wright, and afterwards procured their indorsement. So far as appears, they only allowed Barber to use their names, and therefore, the court should not have instructed that it was necessary to connect them with the usurious transaction. That assumes that they were *bona fide* payees of the note, which is at least doubtful, and should have been left to the jury.

But the note, before it fell due, was indorsed by Barber, to the plaintiff Daniels, to collect in payment of a debt due him from Barber, which the latter swears was about one hundred dol-
[*333] lars, and to account to Barber for the residue. If Daniels took the note as collateral security for a pre-existing debt he is a holder for a valuable consideration. *Manning* v. *McClure*, decided January term, 1865. He would be so, however, only to the extent of the debt due him from Barber, and as to the residue of the note the same defense can be made as if it had not been assigned to Daniels.

Judgment reversed.

THE PEORIA MARINE AND FIRE INSURANCE COMPANY
v.
CHARLES L. FROST *et al.*

1. REMEDY—*in whose name it must be sought.* When an injury is done to property, the remedy must be sought, in the courts of common law, by some person who has an estate in the property, legal or equitable, which the law recognizes.

2. INSURANCE—*right of insurer.* Where insured property has been burned by the carelessness of a railway company, and the insurance company has paid the loss, it cannot maintain an action in its own name against the railway company. The suit must be brought in the name of the owner of the property for the use of the insurer.

3. SAME. Although a different rule may be applied in cases of marine insurance, it rests upon the doctrine of abandonment, and subrogation of the insurer to the rights and title of the insured, a doctrine which has no existence in cases of fire insurance.

4. NEW TRIAL. Where the action is not maintainable, in any view of the evidence, the judgment will not be reversed because the court directed the jury to find for the defendant, though such instruction was wrong in form.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. M. WILLIAMSON, Judge, presiding.

This was an action on the case brought at the January term, 1864, by the appellants against the appellees. The material facts are stated in the opinion of the court.

[*334] Messrs. COOPER & GROVE for plaintiffs in error.

Messrs. INGERSOLL & PUTERBAUGH for defendants in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

The defendants in error, who were also defendants below, were, on the 13th of August, 1863, in possession of, using, and running the Logansport, Peoria & Burlington Railroad. The freight train passing Westward on that day, set fire to the warehouse of Grafft & Webster, situated in Peoria county near the track, and the building, with its contents, was consumed. The locomotive had no screen or guards on its smoke stack, and the fire thrown therefrom ignited the warehouse. Grafft & Webster gave notice of their loss to the insurance company, plaintiff herein, which in its turn notified defendants, informing them that the company would hold them liable, and at the expiration of the time fixed by the policy, paid the loss. The insurance company now brings its action against the defendants, controlling the road, alleging that the fire was caused by the gross carelessness of their servants. It is admitted that if there was such carelessness, they were liable, and the only question made upon this record is, whether this liability can be enforced in the name of the present plaintiff, or whether the suit must be brought in the name of the owners of the property destroyed, for the use of the insurance company.

This question first arose in England in the time of Lord MANSFIELD. An act of Parliament made the Hundred liable for injury to property by rioters. A house having been burned by them, and an insurance company having paid the loss, it brought suit against the Hundred in its own name. The Court of King's Bench held that the action could not be maintained, and the judgment was affirmed in the Exchequer Chamber. *London Assurance Company* v. *Lainsbury*, 3 Doug., 245. The other point arose in another case at the same time. *Mason* v. *Lainsbury*, 3 Doug., 60. In that case the action was brought against the Hundred in the name of the owner of the prop- [*335] erty. The Hundred defended on the ground that the insurance company had already paid the loss. The court held that this was no defense — that the Hundred was primarily liable, and that recovery could be had as if the insurance company had not paid. The recovery was for the benefit of the company. This case was followed in *Yates* v. *Whyte*, 4 Bing. N. C., 272, 33 E. C. L., 349.

The same rule has been repeatedly laid down by the most respectable courts of this country. The question was very fully considered in the case of the *Conn. Life Ins. Co.* v. *The N. Y. & N. H. R. R. Co.*, 25 Conn., 265, and although we should be unwilling to adopt all the reasoning of the court, yet the case is a

strong authority against the maintenance of this action. The same point was ruled in *Rockingham Mutual Fire Insurance Co.* v. *Barker*, 39 Maine, 253, the court holding that the insurance company could not maintain the action in its own name. The same doctrine is laid down in *Hart* v. *The Western R. R. Co.*, 13 Met., 101.

The only case quoted by the counsel for the plaintiff in error as holding a different rule, and we presume the only case to be found, is *Quebec Fire Insurance Co.* v. *St. Louis*, 1 Lower Canada, 222, and this case is not an authority because decided upon the principles of the law of France.

In the face of this formidable array of authorities, we are urged in the very elaborate argument of the counsel for the plaintiffs in error, to establish for this State, a new rule. If the question were between allowing this suit to be brought, and giving the plaintiff no remedy for an acknowledged though remote wrong, we should be unwilling to refuse the remedy, even though obliged to depart from former precedents. But it is not a question between this remedy and none at all, but between this remedy and another equally efficacious. The rules of procedure at common law, are the results of centuries of experience applied to human affairs by intellects at once comprehensive and acute, and where we find a principle firmly established by a series of decisions beginning with such names as MANSFIELD and BULLER, and followed [*336] by such courts as we have quoted, with not a single adverse decision to break the current of authorities, we should hesitate long before we pronounce the rule arbitrary and unreasonable, and therefore, unworthy to be followed. If courts were to assume the right to overturn an established rule whenever, if the question were a new one, they might be inclined to hold a different principle, the law would cease to be a system and degenerate into a mere matter of judicial discretion. The profession would be unable to advise their clients, and the reproach of uncertainty—which it is so common to cast upon the administration of justice, would be well deserved.

The decisions we have quoted, proceed upon the ground, that when an injury is done to property, the remedy must be sought in the courts of common law, by some person who has an estate in the property, legal or equitable, which the law recognizes. But the insurance company had no estate or ownership in this property of any kind whatever. It had simply contracted with the owners that in the event of the property being destroyed by fire it would pay them a certain sum of money. This, it is true, gave them a certain moral interest, if we may so call it, in the property, in the same way that creditors of Grafft & Webster, if they had any, had a certain moral interest in the preservation of this prop-

erty, because upon its preservation might depend their power to collect their debt; but surely no one could contend that they may bring a suit against the railroad company for the indirect damages they may have suffered. The law, however, does place the insurance company that has paid the loss on a different footing from creditors, inasmuch as it so far subrogates the insurance company to the rights of the assured, as to allow it to bring a suit against the wrong-doers, but it requires it to be brought in the name of the owners of the property, to whom a direct injury has been done.

But another reason less artificial, may be given for requiring the suit to be so brought. It very often happens that valuable property is insured in several companies at the [*337] same time. If the property is burned through the carelessness of some third person, can such person be liable to as many suits as there are insurances? Is there more than one cause of action against him? And can that be indefinitely divided? What is the measure of damages? Is it the injury done by him to the property, or the amount the insurance companies have paid? Clearly the former. If the several insurance companies have paid more than the actual loss, they cannot make him liable for what they have paid. He is liable to the owner of the property for the injury he has done to it, and although a wrong-doer, it is still his right to have that loss adjusted in a single suit. The companies may unite in bringing an action for their use in the name of the assured. The recovery will be for the injury done to the property, and when the judgment is obtained, the court will determine, as between the different companies how the proceeds of the judgment are to be divided.

The counsel for the plaintiff in error quote several cases in which mortgagees, the condition of the mortgage being broken, have been allowed to recover against trespassers for impairing the value of the security. We recognize that as the law, but it does not conflict with the cases above cited. This recovery proceeds upon the ground that the mortgagee has an estate in the mortgaged premises which the law recognizes, and will protect. So also in the case of *Marsh* v. *Billings*, 7 Cush., 322, the action was brought by the person to whom the injury was done. No other person had a right of action.

We have said that the counsel for the plaintiff in error had cited no case decided in courts governed by the common law, in which it had been held that the insurance company could maintain the action in its own name. We referred to cases of fire insurance. Counsel cite the case of the *Columbus Insurance Co.* v. *Curtenius*, 6 McLean, 209, as an instance of recovery

[*338] in the name of the company. This question was not raised in that case. Besides that was a marine insurance, which, in many respects, is governed by different principles from those which control fire insurance. The doctrine of abandonment is not recognized in the latter, while in the former it is familiar, and when it occurs, the title of the property insured at once vests in the underwriters, and it has been said, that the abandonment has, for this purpose, a re-troactive effect. If then the right of action, in its own name, belongs to a marine insurance company, in cases of abandonment, it rests upon a doctrine which has no existence in cases of fire insurance.

The counsel for the plaintiff in error contend that we must reverse the judgment because the court below instructed the jury, in terms, that they were to find for the defendant. This instruction was in form objectionable, but inasmuch as, if the jury had found for the plaintiff, we should feel constrained to set the verdict aside, as the court below itself would doubtless have done, we do not deem it proper, on account of the erroneous form of this instruction, to reverse the judgment.

The insurance company will, however, be at liberty to bring a suit in the name of Grafft & Webster, to its use, indemnifying them, if they require it, against the costs, and this suit will be under the control of the company.

Judgment affirmed.

ABRAM G. COURSEN
v.
EDWARD ELY.

1. NEGLIGENCE—*in cases of collision.* In action brought by the owner of one vehicle against the owner of another, for damages resulting from a collision, if the defendant has been guilty of negligence, and the plaintiff has shown all the care and skill which can be expected from men of ordinary prudence in like circumstances, he is entitled to recover.

[*339] 2. SAME. Although the plaintiff may be guilty of some degree of negligence, yet if it is but slight as compared with that of the defendant, the plaintiff can recover, and this rule holds even where the slight negligence of the plaintiff in some degree contributed to the injury.

3. NEW TRIAL. If this court can see that an erroneous ruling of the court below has worked the defendant no injury, such ruling is no ground for a reversal of the judgment.

APPEAL from the Superior Court of Chicago.

This was an action on the case brought by the appellee against the appellant and tried at the September term, 1864. The plaintiff recovered a verdict and had judgment for $250. The material facts are stated in the opinion of the court.

Messrs. GARRISON & BLANCHARD for appellant.

Mr. CHARLES A. DUPEE for appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

This was an action on the case brought by Ely, for injuries to his horse and carriage done by a servant of Coursen, while driving his master's team. The carriage was passing along Clark street, Chicago, and the servant of the defendant below, undertook to pass it with his double team and heavy grain wagon, both vehicles moving in the same direction. A collision occurred, and for the damages resulting therefrom the jury gave the plaintiff a verdict. The evidence is conflicting as to how far the plaintiff may have himself contributed to the accident, or whether it was solely the result of carelessness on the part of defendant's servant. The jury were the proper judges of the degree of credit to be given to the various witnesses, and we find nothing in the record requiring us to set aside the verdict as being unsustained by the evidence.

It is, however, urged that there was error in the instructions. The 4th and 5th instructions given for the plaintiff embody the law of the case as laid down by the court, and it is to these that counsel for plaintiff in error chiefly object. [*340] They are as follows:

"If the jury believe from the evidence that the injuries complained of were caused by the negligence or carelessness of the servant of the defendant, in the course of his employment as such servant, either without any negligence or fault on the part of plaintiff's servant; or without any such fault or negligence on his part as contributed to the injuries complained of; or with no want of such care and skill on his part as could reasonably be expected of a man of ordinary prudence and skill in such a situation then they will find for the plaintiff."

"5. The jury are instructed that in determining the question of negligence, they are to take into consideration the situation of both parties, and that if they believe from the evidence that the injury was caused by the negligence or fault of defendant's driver, without any greater want of skill or care on the part of plaintiff's driver, than could reasonably be expected of a person of ordinary prudence and skill, in such a situation as he was, that the plaintiff is entitled to recover."

We see no objection to these instructions. If, in cases of this character, the defendant has been guilty of negligence, and the plaintiff has shown all the care and skill which can be expected from men of ordinary prudence in like circumstances, then the plaintiff is entitled to recover. This has been settled by repeated decisions of this court. *Aurora Branch R. R.* v. *Grimes*, 13 Ill., 588; *Dyer* v. *Talcott*, 16 Ill., 300; *Galena & Chicago*

Union R. R. Co. v. *Fay*, 16 Ib., 588; *Same* v. *Jacobs*, 20 Ib., 496.

On behalf of the defendant the court instructed the jury, "that if they believed the alleged injury to the plaintiff's horse and carriage was produced in whole or in part by the negligence or misconduct of the plaintiff's servant then the [*341] jury will find for the defendant." This was quite as favorable a presentation of the law as the defendant was entitled to, since this court has held in *G. & C. R. R. Co.* v. *Jacobs*, 20 Ill., 496, and *C. B. & Q. R. R. Co.* v. *Dewey*, 26 Ill., 258, and in several more recent cases, that although the plaintiff may be guilty of some degree of negligence, yet if it is but slight as compared with that of the defendant, the plaintiff shall be allowed to recover, and we have held, at the present term, in the case of the *Chicago & Alton R. R.* v. *Hogarth*, that this rule applies even where the slight negligence of the plaintiff in some degree contributed to the injury.

The modification by the court of the defendant's 3d and 5th instructions was in accordance with these principles and unobjectionable.

The objection that the defendant was not permitted to have his motion for a new trial passed upon by all the judges of the Superior Court in banc, even if an erroneous ruling, which we do not decide, is no ground for reversing the judgment, because such ruling worked the defendant no injury. We must presume that that court in banc would have held, as we do, that there was no ground in the record for granting a new trial.

Judgment affirmed.

ANTHONY C. HESSING
v.
MARY O. MCCLOSKEY.

1. FRAUD—*possession by a vendor of goods, of a part—its effect upon the vendee's right as to the residue, not in the vendor's possession.* A debtor sold and delivered a lot of goods in New York, which were shipped by the purchaser to Iowa. A portion of the goods were seized *in transitu*, while in possession of the agent of the vendee, under writs of attachment sued out by creditors of the vendor; the sale being a *bona fide* one, it was held, that the title of the vendee to this portion of the goods could not be affected by the fact, even if such [*342] fact existed, that the residue of the goods had reached their destination, and were in the possession of the vendor. The goods thus seized, while in the possession of the vendee's agent, stood unembarrassed by any difficulties which might have surrounded that portion which had reached their destination.

2. FRAUDULENT CONVEYANCE—*both parties must participate in the fraudulent intent.* In order that a transfer of goods shall be deemed fraudulent as to creditors of the vendor, both the vendor and his vendee must be guilty of the fraudulent intent.

3. SAME—*A party, though in debt, may sell his property.* A party, though

in debt, may sell his property to any one he pleases, for an honest and fair consideration, if no lien exists to forbid it. If the transaction be an honest one, made in good faith, and for an adequate consideration, it matters not how many creditors may be prevented thereby from reaching the property.

4. A DEBTOR MAY PREFER HIS CREDITORS. And a debtor, in the sale of his property, has a right to prefer one creditor over all others. He may sell his property to one of his creditors in payment of his debt to him, to the exclusion of other creditors, and the consideration will be sufficient to support the transfer.

5. TRESPASS — *de bonis asportatis — against a sheriff — and herein of the measure of damages.* Where there has been a *bona fide* sale and delivery of goods by the owner to any one of his creditors, in payment of a debt, and the goods are afterwards taken by the sheriff, under writs of attachment sued out by other creditors of the vendor, the vendee may maintain trespass against the sheriff, and recover, as damages, the value of the goods at the time of such taking, with interest from that time to the time of trial, at the rate of six per cent. per annum.

6. EVIDENCE — *subsequent declarations and acts of a vendor.* The declarations or acts of a vendor of property, which he has sold and delivered, cannot be received to prejudice the title of his vendee.

7. INSTRUCTIONS — *need not embody all the law governing the case.* An instruction which declares the law on the points therein presented, is sufficient, although it does not present all the law governing the case.

8. SAME — *embodying mere abstract propositions of law, may be refused.* Where an instruction asked contains a mere abstract legal proposition, though correctly stated, error cannot be assigned on the refusal of the court to give it

9. SAME — *if embraced in another, may be refused.* An instruction which is fully embraced in another, already given, may properly be refused.

10. SAME — *must be based upon the evidence.* An instruction not based upon the evidence should not be given.

APPEAL from the Superior Court of Chicago.

This was an action of trespass *de bonis asportatis*, [*343] brought in the Superior Court of Chicago by Mary O. McCloskey, against Anthony C. Hessing. To the declaration, the defendant pleaded a seizure of the goods, as sheriff, on process in his hands to be executed, against Cyrus M. Bellamy. The plaintiff claimed the goods by purchase from C. M. Bellamy before the writs of attachment were issued. Much evidence was introduced as to the *bona fides* of the transaction, which it is unnecessary to state, inasmuch as the case is made to turn upon the instructions given on behalf of the plaintiff, and refused on the part of the defendant.

The instruction given for the plaintiff was as follows:

Although the jury may believe, from the evidence, that the possession of the goods at McGregor, Iowa, was in Cyrus M. Bellamy, and not in the possession of George T. Bellamy, as the agent of the plaintiff, yet the right of recovery for these goods being in Chicago *is not necessarily thereby affected;* and if the jury believe, from the evidence, that the sale in New York was a fair one, and the possession of the goods in Chicago was in the plaintiff, or her agent, then in that case, the plaintiff might recover for these goods in Chicago, although she might not have

been enabled to have recovered had she sued for a seizure of the goods at McGregor.

To the giving of this instruction, the defendant then and there excepted.

The following instructions were asked by the defendant, and refused, and exceptions taken:

That every grant or conveyance of goods and chattels, by writing or otherwise, had or made or continued to the intent or purpose to delay or prevent creditors from reaching the goods and chattels in satisfaction of their lawful debts, is absolutely void.

If the jury believe, from the evidence, that the arrangement of the transfer in question was entered into by the plaintiff and Cyrus M. Bellamy, to enable him to remove the [*344] goods from New York to Iowa, to prevent his creditors from reaching the same, then the jury will find a verdict for the defendant.

If the jury believe, from the evidence, that the transfer of the goods by Cyrus M. Bellamy to the plaintiff, was made under cover of the plaintiff's claim and judgment, to enable him to remove the goods from New York, out of the reach of the creditors of T. Bellamy & Son, to prevent creditors reaching them, then the transfer is absolutely void; although the plaintiff may have had a *bona fide* debt and judgment against Cyrus M. Bellamy, and your verdict will be for the defendant.

The jury are instructed as matter of law, that if they believe, from the evidence, that the plaintiff had a *bona fide* debt against Cyrus M. Bellamy, and used it, or allowed it to be used to cover the goods in question, to enable Cyrus M. Bellamy to remove the goods from New York city, to be used for the benefit in any way, or to prevent his creditors from reaching the same in satisfaction of their debts, then the transfer is absolutely void, and the jury will find for the defendant.

The jury are instructed as matter of law, that if they believe from the evidence, that Thomas Bellamy transferred his interest in the goods of Cyrus M. Bellamy, that he was to pay the company debts first, that the five thousand dollars had by Thomas Bellamy, in 1859, of the plaintiff, was to be capital at the risk of the business; then the giving of a note by Cyrus M. Bellamy to plaintiff, on December 10, 1860, for that amount, and interest, and allowing a suit to be instituted by the plaintiff immediately upon that note, against him, without notice to his creditors; then such facts raise a strong presumption of fraud in the whole transaction.

The jury are instructed as matter of law, that it is not necessary that there should be positive proof of fraud; that fraud may

be presumed from facts and circumstances proved in the case, and if the jury believe, from the evidence, that the [*345] transfer was made with the intent to hinder or delay the creditors in the collection of their debts against T. Bellamy & Son, or to enable Cyrus M. Bellamy to appropriate the goods or any part of them, to his use after the transfer, to the injury of his creditors, then the transaction is void, and the jury will find for the defendant.

The jury are instructed, that if they believe, from the evidence in this case, that at the time of the sale of the goods in controversy was made by Cyrus M. Bellamy to the plaintiff, the said Bellamy was involved in debt, and that the plaintiff, or her agent or agents knew it, and that such sale was made by the parties thereto, for the purpose of enabling the said Bellamy to control said goods, and have the benefits thereof, so that his creditors could not reach the same, then the sale is void, and the plaintiff cannot recover.

The jury are instructed that the intent of the parties to the sale of the goods in controversy from Cyrus M. Bellamy to the plaintiff, may be determined from the acts of the parties thereto, both before and after such sale; and if the jury believe, from the evidence in the case, that the sum of $5,000 was advanced by plaintiff to Thomas Bellamy for the purpose of being used by him as capital at the risk of his business, that Thomas Bellamy and Cyrus M. Bellamy, during the time they were in business together, contracted debts which were owing by said firm at the time the sale was made to plaintiff, that she, or her agents, knew of such indebtedness, that Cyrus M. Bellamy, a short time after his purchase from his father, went West with the intention of finding a location to which he could transfer his business, and that plaintiff, or her agent, knew that fact, that said Bellamy made arrangements for going into business at McGregor's Landing, Iowa, and then returned to New York, that immediately after his return the sale was made, and upon his advice the goods were immediately after the sale shipped to McGregor's Landing, to the care of George M. Counts, that Bellamy individually afterwards wrote said Counts advising him that the goods had [*346] been shipped to him and requesting him to rent a store, that said Bellamy afterwards went to McGregor, paid the freight on said goods, put them in the store and exercised acts of ownership and control of them, that he finally negotiated and effected a sale of said stock of goods, and has since, with his brother, been using the avails thereof, with the consent of the plaintiff, and that she has never been paid over said avails, and has never demanded the same, then the jury would have the right to consider such facts as badges of fraud in determining whether the purpose of the

sale from Bellamy to plaintiff was to enable Bellamy to control the property and keep the same beyond the use of creditors.

The following instruction was given by the court on its own motion:

The court instructs the jury that the main question in this cause is as to the honesty and good faith of the alleged transfer of the goods in question from Cyrus M. Bellamy to the plaintiff. If that sale was in good faith, for an adequate consideration for the purpose of paying a debt or debts, which he owed to her, and if the possession of the goods was delivered to her, or to Mr. Shuard, or George T. Bellamy, acting for her, by her authority, for her use, then no subsequent acts or declarations of Cyrus M. Bellamy, as to the goods that arrived at McGregor's Landing, would affect her title or right to recover for the taking of the goods in question, and therefore, if the jury believe, from the evidence, *that the goods were so transferred as above mentioned*, and if the jury further believe, from the evidence, that the defendant took the goods in question, under the attachments against Cyrus M. Bellamy, after such transfer and delivery, then the plaintiff is entitled to recover as damages in this action, the value of the goods at the time of such taking, with interest from that time to the present, at the rate of six per cent. per annum.

[*347] But if on the contrary, the jury find, from the evidence, that such transfer was not in good faith, for an adequate consideration as before mentioned, or that the possession was not delivered as before mentioned, and if the jury find, from the evidence, that the defendant, as sheriff of Cook county, Illinois, took the goods under writs of attachment against Cyrus M. Bellamy, in favor of persons who were creditors of Cyrus M. Bellamy, upon debts existing at the time of such transfer, then the plaintiff is not entitled to recover in this action.

To the giving of which by the court, the counsel for the defendant then and there excepted.

The jury found a verdict for the plaintiff, on which the court rendered judgment. The defendant brings the case to this court by appeal.

The questions presented under the assignment of errors, relate to the character which will attach to the transfer of goods by a debtor to one of his creditors in payment of a debt, to the exclusion of his other creditors; there are also some minor questions presented as to the sufficiency of some of the instructions given to the jury.

Mr. E. S. SMITH for the appellant.

Mr. J. W. SMITH and Mr. J. P. ARWOOD for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was an action of trespass *de bonis asportatis*, brought in the Superior Court of Chicago by appellee against appellant.

The issues were made up on the plea of not guilty, and four special pleas, by which the defendant sought to justify the taking, by virtue of four different writs of attachment in his hands as sheriff of Cook county, against the goods and chattels of Thomas and Cyrus M. Bellamy.

The jury found the defendant guilty, and assessed the damages at two thousand and four hundred and seventeen 50-100 dollars, for which the court, on overruling a motion [*348] for a new trial, rendered judgment.

The controversy, therefore, is between the vendee and the creditors of the vendor, for the value of the goods and chattels, which consisted of clothing and some piece goods.

The leading question before the court and jury was, as to the validity of the sale from Cyrus M. Bellamy to appellee. There was much testimony on the point, which is all carefully preserved, and which we have considered, and which, in our judgment, establishes the validity of the sale.

The only question, therefore, before us, is, was the case fairly submitted to the jury, by the instructions of the court?

The appellant insists it was not so submitted, and complains that the court gave this instruction for the plaintiff, numbered three:

Although the jury may believe, from the evidence, that the possession of the goods at McGregor, Iowa, was in Cyrus M. Bellamy, and not in the possession of George T. Bellamy, as the agent of the plaintiff, yet the right of recovery for these goods being in Chicago, *is not necessarily thereby affected;* and if the jury believe, from the evidence, that the sale in New York was a fair one, and the possession of the goods in Chicago was in the plaintiff, or her agent, then in that case, the plaintiff might recover for these goods in Chicago, although she might not have been enabled to have recovered had she sued for a seizure of the goods at McGregor.

To understand the bearing of this instruction, it is necessary to state, that on the sale being consummated in New York, the agent of the plaintiff had them boxed up in a large number of boxes, and marked to one Counts, at McGregor, Iowa. Some of the boxes arrived there, and were taken into the possession of George T. Bellamy, the brother and agent of the plaintiff, whilst these in controversy were seized at Chicago, in their transit to McGregor. There was some testimony tending to show [*349] that the goods which reached McGregor came into the

possession of Cyrus M. Bellamy, the vendor. We think, under this state of facts, that if so, the goods seized at Chicago could not and ought not to be affected by it. They were in the possession of the plaintiff's agent at Chicago, and stood unembarrassed by any difficulties which might have surrounded that portion of the goods which reached McGregor. The court did not intimate, in this instruction, as the counsel for appellant argues it did, that appellee could not have recovered for the goods at McGregor, had they been seized. The language used by the court is susceptible of no such meaning. It simply told the jury, that although the plaintiff might not have been enabled to recover those goods which reached McGregor, had she sued for a seizure of those goods, still that did not prevent her from recovering those goods which were taken out of the possession of her agent at Chicago, if the sale in New York was a fair one. If there be a fault in this instruction, it is against the plaintiff, and injured her case, if injury it did in any quarter. The truth of the matter is, if the sale in New York was a fair sale, we do not see how the goods could have been seized at McGregor, and taken out of the possession of her agent there.

But to place the whole matter in the clearest light possible, the court, of its own motion, gave to the jury the following instruction, and numbered four:

The court instructs the jury that the main question in this cause is as to the honesty and good faith of the alleged transfer of the goods in question, from Cyrus M. Bellamy to the plaintiff. If that sale was in good faith, for an adequate consideration for the purpose of paying a debt or debts, which he owed to her, and if the possession of the goods was delivered to her, or to Mr. Shuard, or George T. Bellamy, acting for her, by her authority, for her use, then no subsequent acts or declarations of Cyrus M. Bellamy, as to the goods that arrived at McGregor's Land-
[*350] ing, would affect her title or right to recover for the taking of the goods in question, and therefore, if the jury believe, from the evidence, that the goods were so transferred as above mentioned, and if the jury further believe, from the evidence, that the defendant took the goods in question, under the attachments against Cyrus M. Bellamy, after such transfer and delivery, then the plaintiff is entitled to recover as damages in this action, the value of the goods at the time of such taking, with interest from that time to the present, at the rate of six per cent. per annum. But if on the contrary, the jury find, from the evidence, that such transfer was not in good faith, for an adequate consideration as before mentioned, or that the possession was not delivered as before mentioned, and if the jury find, from the evidence, that the defendant, as sheriff of Cook county, Illinois, took the

goods under writs of attachment against Cyrus M. Bellamy, in favor of persons who were creditors of Cyrus M. Bellamy, upon debts existing at the time of such transfer, then the plaintiff is not entitled to recover in this action.

Here is the whole case narrowed down by this instruction to a very small compass, rendering any other instruction wholly unnecessary. But the counsel for appellant take exception to this instruction, and because the court introduced the name of George T. Bellamy into it, as receiver of the goods as agent of the plaintiff, it was erroneous, for the reason, there is no evidence connecting him with the delivery of the goods.

About this, the counsel are certainly mistaken. Mr. Shuard testifies that George T. helped to pack the goods in New York, and to mark them for McGregor's Landing. He also stated on his recall and re-examination, in reply to the question, what arrangement was made between him and plaintiff in reference to who should take the custody of the goods from the time of their leaving New York, he answered, the arrangement was, that her brother, George T. Bellamy, was to go on with the goods, and should go West, and attend to the sale of the goods, [*351] and if he needed any specific instructions, he was to stop on his way, and see Mr. Townsend, who had charge of her matters, and he would direct him. It was also proved by the testimony of Cyrus M. Bellamy, that the plaintiff had executed to George T. a power of attorney to act for her, which was produced and read on the trial. This is sufficient evidence to justify the court in connecting George T. Bellamy with the transaction in the mode it was done by the court, and is not obnoxious to the criticism bestowed upon it by appellant.

But it is further insisted, the instruction was improper, because it did not tell the jury what was good faith in a contract of sale, and what was, in law, an adequate consideration. Did the appellant desire the jury should be informed on these points, it was quite easy for him to have asked instructions to enlighten the jury. It is sufficient, if the instructions which the court gives declare the law on the points presented. So far as this instruction went, and to the extent asked, it was a proper instruction. None of the exceptions taken to it can prevail, as it embodies the law of the case, and directed the minds of the jury to the real points in controversy.

But it is further insisted by appellant, that the case was not fully submitted to the jury, for the reason the court refused to give certain instructions asked on his behalf.

The first of those instructions was this:

That every grant or conveyance of goods and chattels, by writing or otherwise, had or made or continued to the intent or pur-

pose to delay or prevent creditors from reaching the goods and chattels, in satisfaction of their lawful debts, is absolutely void.

There are several objections to this instruction. The first is, the Statute uses the word "contrived," not continued, and also uses, in connection therewith, the words "of malice, fraud, [*352] covin, collusion or guile to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions," etc. Second, Both parties must be guilty of this intent. *Ewing* v. *Runkle*, 20 Ill., 448. As asked, it was calculated to mislead the jury. Besides, as it purported to contain a mere abstract legal proposition, if correctly stated, error could not be assigned on the refusal of the court to give it. *Atkinson* v. *Lester*, 1 Scam., 407; *Corbin* v. *Shearer*, 3 Gilm., 482.

The fourth instruction was properly refused, for the reason that the *bona fides*—the honesty of the arrangement, is left wholly out of the question. We understand the rule of law to be, if the transaction be an honest one, made in good faith and for an adequate consideration, it matters not how many creditors may be prevented thereby from reaching the property. It is well settled, a party though in debt, may sell his property to any one he pleases, for an honest and fair consideration, if no lien exists to forbid it. Nor can it be denied that a debtor has a right to prefer one creditor over all others. *Waddams* v. *Humphrey et al.*, 22 Ill., 661. And besides, this instruction was fully embraced in the instruction given by the court, on its own motion. The fifth instruction is liable to the same objection. The sixth is as follows:

If the jury believe, from the evidence, that the plaintiff had a *bona fide* debt against Cyrus M. Bellamy, and used it, or allowed it to be used to cover the goods in question, to enable Cyrus M. Bellamy to remove the goods from New York, to be used for the (his) benefit in any way, or to prevent his creditors from reaching the same in satisfaction of their debts, then the transfer is absolutely void, and they will find for the defendant.

This instruction is open to several objections. In the first place, there is no evidence on which it can be based. The proof is, there was an actual sale and delivery of these goods to appellee, for an adequate price paid by her, and an actual delivery [*353] to her agent, who took the necessary steps to ship them West to McGregor. After this sale and delivery, appellee had no debt existing against C. M. Bellamy, it was fully paid and satisfied by the sale and delivery. In the next place, appellee being the owner of the goods purchased in good faith, and for an adequate consideration, had a right to do with them as she pleased—to ship them to McGregor, or elsewhere as her judgment inclined.

The seventh was properly refused, as there is no evidence that

Cyrus, when he took the stock of goods from Thomas Bellamy & Son, was first to pay the company debts, or that the five thousand dollars appellee had loaned Thomas Bellamy was to be at the risk of the business, as so much capital invested. The weight of the evidence most clearly is, that it was a loan, and not a contribution of capital.

The eighth is liable to the objections pointed out to the defendant's first instruction.

The ninth is in the same category. The law is, that both parties must contrive the conveyance with malice, fraud, covin, collusion or guile. They must both be guilty of the contrivance and intent. *Ewing* v. *Runkle*, above cited.

Instruction numbered ten is objectionable in this, that the declarations or acts of a vendor of property, which he has sold and delivered, cannot be received to prejudice the title of his vendee. Nor do we understand the evidence as sustaining the prayer for this instruction.

We think the whole law of the case was fully and correctly given to the jury in the instruction of the court on its own motion. No good ground of exception has been taken to that instruction, and it covers the whole case.

Were not the active parties in this sale of the goods near relatives it is not at all probable any suspicion would have been excited as to the fairness of the transaction. A *bona fide* debt, equal to one-half the fortune of appellee was due her for advances made her father and her brother, and the latter, when in failing circumstances, chooses to prefer his sister as a favored [*354] creditor, as she necessarily was, and as he has a perfect right to do, to the exclusion of other creditors not so meritorious. The testimony of Mr. Townsend explains the whole transaction, and frees it, and the parties engaged in it, from all suspicion of fraud. The evidence fully sustains the jury in the conclusions to which they arrived, and the court ably and clearly expounded the law to them.

There being no error in the record, the judgment must be affirmed.

Judgment affirmed.

ILLINOIS CENTRAL INSURANCE COMPANY

v.

ANDREW J. WOLF.

1. PAROL EVIDENCE—*how far admissible to contradict recitals in deed.* Although parol evidence is admissible to contradict the acknowledgment in a deed of the payment of the consideration, provided it is not sought to impair the legal effect of the deed as a conveyance, yet it is inadmissible for the purpose of making the deed null.

2. POLICY OF INSURANCE. An insurance company cannot contradict the receipt of the premium contained in the policy for the purpose of avoiding it.

APPEAL from the Circuit Court of McLean county; the Hon. JOHN M. SCOTT, Judge, presiding.

This was an action of covenant brought upon a policy of insurance at the September term, 1864, in which the plaintiff recovered a judgment for $600. All the material facts are given in the opinion of the court.

Messrs. GALLAGHER, MOORE & GREEN for appellants.

Messrs. TIPTON & BENJAMIN for appellee.

[*355] Mr. JUSTICE LAWRENCE delivered the opinion of the court:

This was an action of covenant brought by the appellee upon a policy of insurance. The policy, which was under seal, admitted the receipt, by the company, of the premium. The case was tried in the court below without a jury, and on the trial the appellant sought to prove, by parol, that although the policy admitted the payment of the premium, yet it was not in fact paid, but a note at sixty days was taken therefor. It was insisted, said note not having been paid, that the policy was void under one of the conditions therein, to the effect that where a note is taken for the premium, it shall be considered a cash payment, provided it is paid when due, but if not paid when due, the policy shall then be void. The appellee objected to this proof as in itself incomplete, and also on the ground that the company had waived whatever right it might have had to declare the policy void. The court rejected or disregarded the evidence offered, and gave judgment against the company.

The only point made by the appellant's counsel, in their printed brief, relates to this ruling of the court. They insist that the recital, in a deed, of the payment of the consideration is only *prima facie* evidence of such payment, and may be contradicted or explained, and cite *Ayers* v. *McConnell*, 15 Ill., 230, and *Kimball* v. *Walker*, 30 Ill., 482. All that the court held in these

cases was, that parol evidence might be received for the purpose of contradicting the acknowledgment, in a deed, of payment of the consideration, where the object and effect of such evidence were not to vary the legal import of the deed. For example, in a deed for the conveyance of lands, the recital of payment of the consideration may be contradicted, provided it is not sought by such evidence to impair the effect of the deed as a conveyance. But we know of no case, nor do we think any can be found, in which it has been held that the acknowledgment of payment may be contradicted by parol, for the purpose of making the deed null. This very distinction is taken in the case [*356] in 30th Ills., above cited. Now, in the case at bar, if the evidence offered by the company were admitted, the effect would be to change an absolute policy of insurance, running for five years, and good upon its face, into one expiring in sixty days from its date. The policy admits expressly the payment of the premium, which, together with a certain deposit note for a larger amount, according to the usual mode of mutual companies, made the insurance good for five years. This is simply destroying the legal purport of a deed by parol proof, and would be in violation of the radical principles of evidence.

In addition, it may be said, that public policy forbids that policies of insurance should be destroyed in this way. When the insured property is afterwards encumbered, it is common to assign the policy to the incumbrancer. In the event of a loss, however, as the policy is not a negotiable instrument at law, the incumbrancer must sue in the name of the assured, which would let in all defenses that could be made if the policy had never been assigned. The consequence then would be, if the rule contended for by the appellant were to obtain, that instruments good upon their face, and upon the faith of which money is often loaned, would be suddenly found, when brought into use, to be tainted with a secret defect that would make them nullities, although in the hands of an equitable assignee. This should not be permitted.

It has been held in other States that insurance companies can not contradict the receipt of the premium contained in the policy for the purpose of avoiding it. *Grit* v. *National Insurance Co.*, 25 Barb., 189; *New York Central Insurance Co.* v. *National Insurance Co.*, 20 Barb., 486; 3 Kent's Com., 260.

Judgment affirmed.

Syllabus—Statement of the Case—Brief for Plaintiff in Error.

[*357] LUKE HEMENWAY
v.
JOHN H. CROPSEY.

1. USURY—*when can not be set up.* If a note, drawing ten per cent. interest on its face, is assigned before maturity, for a valuable consideration, and without notice, the maker can not set up as a defense, under the act of 1849, that it was not given for money loaned.

2. SAME. There is no substantial difference between the acts of 1845 and 1849, as to the defense of usury, except as to the extent of the forfeiture. Neither act makes the contract void, and under neither act can the defense of usury be made against the innocent assignee of a note who has taken it before maturity, and without notice, for a valuable consideration.

WRIT OF ERROR to the Circuit Court of Lee county; the Hon. W. W. HEATON, Judge, presiding.

This was an action of assumpsit brought by Luke Hemenway against John H. Cropsey, at the June term, 1863, upon a promissory note which had been assigned to the plaintiff, and which was as follows:

$400.00. DIXON, Ill., *October* 17, 1855.

Two years after date, for value received, we, or either of us, promise to pay James Moore, or order, four hundred dollars, at ten per cent. interest to be paid annually.

JOHN H. CROPSEY,
CYRUS ALDRICH.

The defendant pleaded usury, and the question was, whether, under the act af 1849, the defense could be set up against the assignee of a negotiable note who has taken it, before maturity, for a valuable consideration, without notice. The court below sustained the defense, and gave judgment for only six per cent. interest.

[*358] Mr. JAMES K. EDSALL, for plaintiff in error, submitted the following points and authorities:

1. Our usury statutes do not declare an usurious contract void, and the act of January 30, 1849, does not confer the right to set up this defense in any broader terms than is expressed in the fourth section of chapter 54, Revised Statutes of 1855; nor than is usually expressed in other usury laws under which the courts have uniformly held the contract not to be void.

2. The production of the note, with its indorsements, was sufficient evidence that the note was indorsed to the plaintiff before maturity. Where a note is indorsed without date, the presumption of law is that it was indorsed before it became due. *Mobley* v. *Ryan*, 14 Ill., 51; *Stewart* v. *Smith*, 28 Ill., 398. Indeed, there is express evidence that the note was in Hemenway's hands on

the 17th of October, 1856, a year before its maturity. The first payment indorsed is as follows:—"$40. Received on the within, forty dollars, amount of interest due October 17, 1856. [Signed,] L. Hemenway." And it was stipulated and admitted by the parties that such payments were "made in *pursuance* of such indorsements."

3. It was incumbent upon the defendant to prove the averments in his pleas of usury, (which were traversed by the replication,) that the plaintiff had notice at the time the note was assigned to him, that the consideration thereof was not money loaned. Neither party offered any evidence upon this issue. The consideration of the note was expressed by the usual formula, "for value received." Yet the court below held that the note bore evidence upon its face that it was *not* given for money loaned. The most that can be said is, that it was silent upon the subject. But we do not concede this; for the law is that "a promissory note is sufficient evidence of a loan between the original parties." 2 Greenlf. Ev., sec. 112, p. 108; *Payne* v. *Whitmarsh*, 15 Pick., 212.

And as a rule of pleading, a recovery may be had upon [*359] a promissory note under the common count for money lent. *Lane* v. *Adams*, 19 Ill., 168.

Certainly, then, a promissory note in the usual form cannot, upon its face, be evidence of notice to a party purchasing it, that it was not given for money loaned. On the contrary, it was at least *prima facie* evidence of such loan.

4. It is quite true that the note possessed intrinsic evidence that it bore interest at the rate of ten per cent. per annum, and a party purchasing such a note is chargeable with a knowledge of the law which renders the same usurious as to the excess of six per cent. interest, unless the consideration thereof was money loaned. But it is sufficient to protect an innocent purchaser that the note could, under any circumstances be valid in the form it was expressed. Hemenway was not bound to presume, or even suspect, that Moore and Cropsey had violated the law and contracted for usurious interest, until evidence thereof was brought to his notice. Want, or failure of consideration, is a meritorious, as well as legal defense to a note, and every assignee of a note is chargeable with notice of this law; and yet no one will pretend that a party purchasing a note before maturity, is required to first investigate the circumstances under which the note was given, and satisfy himself of the fairness and validity of the consideration before he can claim the immunities of a *bona fide* assignee.

The case of *McIntyre* v. *Preston*, 5 Gilm., 48, is in point upon this question, so far as any legal principle is involved. It

is there held that if an insurance company have power to take a promissory note for the premiums in the usual course of their business, and for no other purpose, a note given to them would be valid in the hands of a *bona fide* assignee, although the company may not have had power to take the particular note; and that it would not be admissible for the maker to show that such
[*360] note was not taken in the ordinary course of business of the company, without first showing that the assignee was not a *bona fide* purchaser. *McIntyre* v. *Preston*, 5 Gilm., 48, 60, 62; *Wilmarth* v. *Crawford*, 10 Wend., 341.

We submit, therefore, that the ruling of the Circuit Court, that the note upon its face contained evidence of notice to the plaintiff that the same was not given for money loaned, was erroneous.

Mr. GEORGE P. GOODWIN, for defendant in error, made the following points:

The said law of 1849 provides that if upon the trial of the said issue, it shall be found that the said note or writing, obligatory on which suit was brought, was not given for money loaned, then the court shall give judgment for the principal sum and six per cent. interest; and that, too, irrespective of in whose hands the note may be found, or in whose name the suit on said note may be brought.

There is this difference between the fourth section of the act of 1845, and the second section of the act of 1849, that the former declared a forfeiture of three-fold the whole amount of interest, reserved as a penalty, and the latter declared all excess over and above six per cent., except for money loaned, illegal and void, and the rights or interests of third parties, as indorsees, under the two laws respectively, would be quite differently affected.

The said note bore upon its face a rate of interest, which was at the time of the making, and of the indorsement of the same, by the laws of this State, illegal and usurious, unless given for money loaned, and was of itself sufficient notice, if any notice was necessary to any subsequent holder or indorsee, that such interest was *prima facie* usurious and illegal, and sufficient to put such holder or indorsee on his inquiry as to the real consideration of said note. Story on promissory notes, sec. 197; American leading cases, vol. 1, p. 336; *Trustees of Iowa College* v. *Hill;* American Law Register, new series, vol. 2, p. 744.

[*361] Had the note expressed on its face that it was for money loaned, then the defendant would have been estopped from pleading and proving on the trial that the consideration of the note was not money loaned, as against a *bona fide* indorsee; but

such is not this case. The note itself bears the evidence upon its face of a higher rate of interest being reserved than was allowed by law, except for money loaned; and said note bears no evidence, nor is it a presumption of law, that it was given for money loaned.

The note itself carried with it the evidence of its being infected with usury, unless brought within the exception provided by the statute which authorized the reservation of ten per cent.; and as a rule of law it is submitted that the court will not presume the exception; it must be averred and proved. Gould's Pleadings, chap. 4, sec. 22.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

This was an action on a promissory note brought by the endorsee against the maker. The note bore date October 17, 1855, and drew ten per cent. interest, without specifying that it was for money loaned. The court below gave judgment for only six per cent. interest, although the plaintiff, so far as appeared, was a *bona fide* indorsee, without notice that the note was not for money loaned. The statute of 1849, which allowed ten per cent. interest to be taken only for money loaned, was in force when the note was given, and the only question necessary to be considered is, whether the defense here made can be allowed, and the interest reduced from ten to six per cent. as against an indorsee who has bought the note before maturity and without notice. It has been repeatedly held by this court that, under the act of 1845, an usurious contract is not void, and the defense of usury can not be made against an innocent indorsee of a negotiable instrument assigned before maturity. It is only where the statute makes usurious contracts absolutely void, that this defense can be set up against such indorsee. *Conklin* v. *Underhill*, 3 Scam., 388; *Sherman* v. *Blackman*, 24 Ill., 345. There is no substantial difference, as to making this defense, be- [*362] tween the acts of 1845, and 1849, except as to the extent of the forfeiture, and this can not affect the question as to whether the defense can be made against the innocent holder for a valuable consideration. In the case at bar, the act of 1849 did not require the note to express on its face that it was for money loaned, and the purchaser had a right to suppose that it was legally given under the statute. The maker, by his own act in signing the note, had authorized him to draw such presumption.

Judgment reversed.

HENRY C. WALKER *et al.*
v.
THEODORE COLLIER *et al.*

1. IMPANELING A JURY—*how many shall be called at a time.* There is no law requiring four jurors to be called at a time to be sworn. A less or a greater number may be called at any one time, and the parties be required to pass upon them.

2. WITNESS—*competency—in what mode his interest may be shown.* A witness who is objected to, because of an interest in the event of the suit, may be examined on his *voir dire*, or his interest may be shown by witnesses, but resort cannot be had to both modes.

3. SAME—*release to restore competency, though fraudulent, is good for that purpose.* If the release executed to render a witness competent be fraudulent, it is, nevertheless, valid and binding between the parties to it, and when it is produced, a witness cannot be examined to show it is fraudulent.

4. INSTRUCTIONS—*where one of a series is objectionable.* It is sufficient, if a series of instructions properly present the law of the case, though one of the series, when disconnected, might be objectionable.

5. SALES OF PERSONAL PROPERTY—*when made to different persons who has title.* If there be two valid sales of personal property to different persons, he who first lawfully, and without committing a trespass or tort, obtains the possession, has the better title.

[*363] WRIT OF ERROR to the Circuit Court of Marshall county; the Hon. S. L. RICHMOND, Judge, presiding.

This was an action of replevin brought in the Circuit Court of Marshall county, by Theodore Collier and Elijah M. Holloway, against Henry C. Walker and William Walker, for a quantity of cord-wood.

The principal witness in the cause was one Sloover, who had cut and corded the wood, who testified he had never sold and delivered it to any one else but the plaintiffs. That he had sold and delivered it to them on the 28th of March, 1864. There was about forty-one cords, and was piled up near Henry C. Walker's house—had not measured it until he sold and delivered it to the plaintiffs.

Andrew McDonald testified for defendants that he was at work for Henry C. Walker in December, 1863, and that about that time Sloover came to Walker's house with the first load of wood in controversy—had not then delivered any. Sloover drove up to the last gate, and told witness to come and shovel away the snow for Walker's wood; witness shovelled the snow away for three cords; Sloover piled the wood where the snow was shovelled away; there was one cord of Walker's own wood there before Sloover commenced hauling; at another time, Sloover threw down a lot of wood and told witness to come and pile up Walker's wood; witness, with Walker's team, hauled some of the wood and piled it up, and while hauling with Sloover, he told witness he

was hauling the wood to Walker on a contract to haul him one hundred cords in payment for his team.

Another witness (*Mosier*) stated that Sloover had bought two teams of Walker, and a wagon, harness and threshing machine; the first team, wagon, etc. was bought in the fall of 1863; the other team of colts in the winter of that year; Sloover told this witness, when hauling the wood in question, he was to give Walker twenty-five cords of wood on the old team at three dollars and fifty cents per cord, and he was then hauling it; some [*364] time after, when Sloover was hauling the wood in controversy, he further told this witness, he was to give Walker one hundred cords at four dollars per cord, to be delivered by the 15th June, 1864, and Walker was to hire, or pay for cutting it, and he said, if the weather kept good, he would soon have Walker's wood hauled; about six weeks after Sloover had bought the team, and when all the wood that was replevied had been hauled, witness heard a contract between him and Walker, which it was agreed, at the wood pile, when Sloover was unloading the wood, that Walker should buy back the first team at $220, and that the twenty-five cords which had been delivered by Sloover, on first contract, in payment of that team, should go towards paying for the last team, and Walker was to allow him the same for that twenty-five cords as was agreed upon as to the one hundred cords; talked about the wood; Walker said part of it was walnut, and he would not receive it; Sloover said when the one hundred cords was hauled he would measure it all together, and if it did not suit Walker, and they could not agree upon it, they would leave it to neighbors; heard Sloover say while hauling wood that he was hauling wood to Walker on a contract to deliver one hundred cords; none was hauled after the last agreement; the objection to the walnut wood was previous to the agreement under which Walker took back one of the teams. Witness, on cross-examination, stated that soon after the last agreement, Walker took the team and colts back on a chattel mortgage.

Sloover, on being recalled, stated that the wood in question was delivered to Walker on a contract to deliver him one hundred cords in payment of a team; the whole amount was to be hauled and measured before it was delivered. No part of it had ever been measured and delivered. Some time in February, 1863, he sold back to Walker one of the teams for $220, and the twenty-five cords for that team was to go as a part of the one hundred cords which he was to pay for the colts. The twenty-five cords contained the walnut wood which Walker refused to [*365] receive. No part of the wood was to be delivered until it was all hauled and measured, and then, he told Walker, if he was not satisfied with the wood, he need not take it, or he would leave

it to the neighbors. On his cross-examination, he stated, at the time Walker bought back the team, he gave witness up a lot of notes, and he supposed the note for twenty-five cords is among them. This is the substance of all the evidence.

The defendants asked the following instructions, which the court refused, and the defendants excepted:

That if the wood in controversy was by Sloover mixed willfully with Walker's wood and confused the same, then the wood would all belong to Walker, and Sloover could not sell it.

That the fact, if proved, that Walker took the team mentioned from Sloover on a mortgage, has nothing to do with the merits of this case, and should not be considered by them.

That no actual measurement of personal property sold is necessary to pass the title. It is enough if the goods are identified and the control of the same given to vendee.

That if the jury believe, from the evidence, that twenty-five cords of the wood had been delivered to Walker on the first contract, no subsequent contract would revest the title in the wood in Sloover, without a delivery with all the forms necessary in any ordinary sale.

When the seller has performed everything that is required of him as to a certain portion of the thing sold, but something still remains to be done as to the rest, the portion in regard to which the seller has performed all his duty becomes the property of the purchaser, but the portion in respect to which something material is yet to be done still belongs to the seller.

Defendants also asked the following instruction:

[*366] If the jury believe, from the evidence, that Sloover, unconditionally, delivered to Walker the wood in controversy, upon a contract therefor between them, such wood at once became the property of Walker, whether it had been measured or not.

The court refused to give this, as asked, but added thereto as follows:

Unless the contract of sale required the wood to be measured, or some other material act to be done, before the wood should become the property of Walker.

And then gave it as modified, to which defendants excepted.

The court also instructed the jury, on the part of defendants below, as follows:

1. If the jury believe, from the evidence, that Sloover bought a young team of Walker on the 18th of December, 1863, and as part payment agreed to deliver twenty-five cords of wood within thirty days thereafter, and that Sloover did deliver the twenty-five cords of wood, and that said twenty-five cords is part of the wood in controversy, he, Sloover, thereby lost all control and

ownership over said wood, and as to said wood the jury must find for defendant.

2. That if the jury believe, from the evidence, that Sloover, in January, 1864, bought of Walker another team for which he was to give one hundred cords of wood, to be delivered by the 15th of May or June following, and that Sloover did deliver any portion of said wood upon said contract to said Walker, all of said wood so delivered at once became the property of Walker, and as to all such wood, the jury should find for defendants.

3. If the jury believe, from the evidence, that Sloover, unconditionally, delivered to said Walker said wood in controversy on a contract between them, such wood at once became the property of Walker, whether measured or not, unless the [*367] contract required the wood to be measured, or some other material act to be done, before it became the property of Walker.

3. If the jury believe, from the evidence, that Sloover delivered to Walker the wood in question, upon a contract for the same, then the property therein would pass to Walker, and could not be taken from him, by Walker taking the team from Sloover on a chattel mortgage given to Walker, and as to such wood delivered the jury should find for defendants.

8. When the article sold is bulky, as wood in the cord, then a constructive delivery is sufficient.

10. If there be two valid sales of wood in controversy, he who first lawfully, and without committing a trespass or tort, obtains the possession, has the better title.

13. The jury may, if the evidence warrants it, find a part of the wood in plaintiff and a part in defendant, in which case they should specify what part was owned by each.

The jury having returned a verdict for plaintiffs, defendants moved to set the same aside, and for a new trial, for the following reasons:

1. For permitting Sloover to testify, and refusing to permit defendants to examine him as to his interest.

2. Court gave improper instructions for plaintiffs, and refused and improperly modified defendants'.

3. Verdict as to a portion of the wood was manifestly without any evidence to support it.

4. Verdict against the evidence.

This motion being overruled, and exception taken, the defendants then entered a motion in arrest of judgment, which was also overruled.

The cause is brought here by a writ of error, and the following errors assigned:

1. In impaneling jury as was done. [*368]

2. In permitting Sloover to testify, and in refusing to

permit examination touching delivery of release, and touching other interest he might have in the suit.

3. In giving defendants in error's instructions.

4. In refusing and improperly modifying plaintiffs' instructions.

5. Judgment was for defendants in error when it should have been for plaintiffs in error.

Messrs. BANGS & SHAW for the plaintiffs in error.

Messrs. BURNS & CUMMINS for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was an action of replevin in the Marshall Circuit Court, and a trial and verdict for the defendants.

The first objection made is, that when the jury was about to be impaneled, four jurors having been chosen and sworn, two more were called and accepted by the plaintiffs and tendered to the defendants to pass upon. To this they objected, and insisted upon a panel of four being tendered. The court thereupon called two additional jurors, and required the defendants to pass upon the four, to which they objected until the two last called should be chosen by the plaintiffs, but the court required the defendants to challenge or accept the four, whereupon the defendants challenged peremptorily one, and accepted the other three, and excepted.

We are not aware of any statute requiring four, or any other number of jurors, to be called at any one time, to be sworn on a jury. It is the practice to call four, and to call upon the plaintiff in the first instance to pass upon them, but there is no requirement of law on the subject. The only statute we have, is chapter 58, title "Jurors," by the eighth section of which, the clerk of the Circuit Court, at the commencement of each [*369] term, is required to write the name of each petit juror on a separate ticket, and put the whole into a box, or other place for safe keeping; and as often as it shall be necessary to impanel a jury, he, or the sheriff or coroner must, in the presence of the court, draw by chance, twelve names out of such box or other place, which shall designate the twelve to be sworn on the jury, and in the same manner for the second jury in their turn, as the court may from time to time order and direct. Scates' Comp., 680. From this it would seem, the whole number is to be drawn at one time, and sworn, but the practice usually has been, to call four at a time, but there is nothing in the law to prevent a less or greater number being called, and the parties required to pass upon them. There is nothing in this objection.

As to the other point, it is complained by the plaintiffs in

error, that they had a right to examine Sloover as to his interest, and the execution of the release to him, after a witness had been examined touching that interest. The general rule on this subject, as laid down in *Diversey* v. *Will*, 28 Ill., 216, is, that a witness who is objected to, because of interest in the event of the suit, may be examined on his *voir dire*, or his interest may be shown by witnesses, but resort cannot be had to both modes. A case is cited by the plaintiffs in error, from 5 Conn., 258, *Stebbins* v. *Sackett*, where it was held, that though the above be the rule, yet a resort to one mode to prove the interest of the witness on one ground, does not preclude recourse to the other to prove his interest on a distinct ground. Admitting the force of this decision, we do not discover its bearing on this case, as no other ground than a general interest of the witness, Sloover, was suggested on the trial. It is now said here, that plaintiff in error had a right to examine Sloover, after having examined Mosier, as to the delivery of the release, that it might be merely fraudulent, and also to examine him as to other interest he might have in the suit not covered by the release. We see no force in this, for if the release was fraudulent, it was valid and binding between the parties to it, and no special interest in the suit [*370] which Sloover might have had, was specified, which was not covered by the release. The court below was not informed of any such interest, nor is this court.

As to the instructions, taken as a series, they are correct, and fairly present the law of the case. Those refused were fully supplied by those given, and plaintiffs in error have no reason to complain that the law of their case was not fully presented. *Elam* v. *Badger*, 23 Ill., 498; *Schwartz* v. *Schwartz*, 26 Ib., 81; *Warren* v. *Dixon*, 27 Ib., 115.

The evidence sustains the verdict, and the judgment must be affirmed.

Judgment affirmed.

CYRUS H. McCORMICK *et al.*

v.

GEORGE M. HADDEN.

1. SALE OF PERSONAL PROPERTY — *secret lien.* Where the vendor of personal property delivers possession to the purchaser, under an agreement that the property is to be considered as belonging to the vendor until the payment of the purchase money, notwithstanding such delivery of possession, such agreement, as to creditors of the purchaser, is fraudulent and void.

2. DELIVERY OF POSSESSION — *what amounts to, as between the parties.* If the vendor of a reaping machine give to the purchaser, who has executed his note for the purchase money, an order on the person having the custody of the machine to deliver it to the purchaser, the giving of the order is a delivery of possession, and, in the absence of fraud, the order can not be recalled.

Writ of Error to the Circuit Court of DeKalb county; the Hon. Theodore D. Murphy, Judge, presiding.

This was an action of replevin, brought at the September term, 1863, by Cyrus H. McCormick & Co., against George M. Hadden, to recover possession of two horses. The defendant below had a verdict and judgment. The facts appear in the opinion of the court.

[*371] Messrs. Storrs & Marsh for the plaintiffs in error.

Mr. S. W. Brown for the defendant in error.

Mr. Justice Lawrence delivered the opinion of the court:

In November, 1861, the plaintiffs in error, by their agent, Champlin, sold to Gilbert Hadden and Lewis C. Hadden, a reaper, a grain drill and some wheat in store. The purchasers gave their notes for the purchase money, secured by a chattel mortgage on two horses in the possession of Gilbert Hadden. Soon after this transaction, George M. Hadden, the defendant, came to the house of Gilbert, and took away the horses. Thereupon the plaintiffs brought their action of replevin, and the verdict and judgment being against them in the Circuit Court, they have brought the record here.

It appeared on the trial that Gilbert Hadden bought the horses from the defendant about a year before the mortgage was given, and they were delivered into his possession under an agreement that he was to give a chattel mortgage as security for the purchase money, which was to be paid at the end of one year, and until this should be done, the horses were to remain the property of the vendor. This court has, however, decided that such an agreement is constructively fraudulent as to creditors, and that as to them, the property must be considered as belonging to the purchaser holding the possession. See *Ketchum* v. *Watson*, 24 Ill., 591.

It is, however, contended by the counsel for the defendant that the latter resumed possession of the horses before the property bought by Gilbert and Lewis C. Hadden had been actually delivered to them by the plaintiff's agent, and that the credit can not, therefore, be considered as having been given by such agent to the purchasers until the resumption of possession by the defendant gave notice of his title. When the reaper was sold, it was some four miles distant from the place of business of the plaintiffs' agent, and near the residence of the purchasers. The [*372] agent, on the execution of the notes, gave the purchasers an order for the reaper. This was, in itself, a delivery, and at this time the defendant had not resumed possession of the horses. The delivery was complete, because nothing more

remained to be done by the vendor. He had no right to countermand this order unless a fraud had been practiced on him, and in that event he would have had the same right to resume possession after an actual, manual delivery of the property. But he was not bound to resort to this right, and take upon himself the burden of proving the fraud. When the sale was made, the notes and mortgage given, and the reaper placed under the control of the purchaser, the plaintiffs were at liberty to insist on their rights as creditors. It does not appear when the warehouse receipt for the wheat was given. The drill was not delivered until the following March, but that is immaterial, as the rights of the plaintiff under the mortgage became complete as soon as any portion of the property, the payment for which it was intended to secure, was delivered. A new trial should have been granted.

Judgment reversed.

CATHARINE M. ALLEN
v
THE CITY OF MONMOUTH.

1. PROCESS—*whether necessary, on appeals from police magistrate.* Upon an appeal from a police magistrate to the Circuit Court, if the appeal be perfected before the magistrate, by filing the appeal bond in his office, no summons is required to be issued to the appellee; each party, in such case, is bound to follow up the appeal.

2. APPEAL FROM POLICE MAGISTRATE—*appearance—dismissal.* And in such case, when the papers are duly sent up to the circuit court, the cause docketed, and called in order for trial, and no person appearing to prosecute the appeal, it is not error to dismiss the appeal on motion of the appellee, although he was not served with notice of the appeal.

3. SAME—*application of the act of February* 22, 1861. The act of [*373] February 22, 1861, providing "that in all cases of appeals from justices of the peace, perfected ten days before the commencement of the term in appellate court, the appearance of the appellee may be entered in writing, and be filed among the papers of the case;" and that "if such appearance is so entered ten days before the commencement of the term, the case shall stand for trial at said term," does not change the rule as above laid down, in a case conditioned as this is.

4. DISMISSAL FOR WANT OF PROSECUTION—*set aside only where merits are shown.* An order dismissing an appeal in the Circuit Court for want of prosecution, will only be set aside upon affidavit disclosing merits.

5. ERROR—*discretion.* The court has a discretion to grant or refuse to set aside such an order of dismissal, and its action on a motion for that purpose, cannot, therefore, be assigned as error.

APPEAL from the Circuit Court of Warren county; the Hon. JOHN S. THOMPSON, Judge, presiding.

Catharine M. Allen was sued before a police magistrate, for a violation of the ordinances of the city of Monmouth, when a judgment was rendered against her on the 28th of May, 1863, from which judgment she appealed to the Circuit Court of War-

ren county, on the same day, and the transcript and papers were left with the clerk of the Circuit Court, on the 2d day of June thereafter. She perfected the appeal before the magistrate.

On the 27th of October, 1864, the defendant was called and defaulted, and the appeal dismissed, the cause having been called in its order.

On 1st November, 1864, the defendant entered her motion to set aside the default taken against her, but the court overruled the motion, and defendant excepted, and prayed an appeal to the Supreme Court.

It appears from a bill of exception, filed in the cause, that upon the hearing of the motion to set aside the default, an affidavit of the defendant's attorney was read, stating that he had been employed by the defendant to attend to her said cause in the Circuit Court. That in the practice and decisions of that court, a [*374] failure on the part of an appellant to pay the judge's docket fee, required by the act of the legislature, was no ground for dismissing an appeal.

No docket fee was ever paid by either party until a short time before the cause was called, and defendant defaulted, when the cause was placed on the judge's docket, but never was placed on the bar docket, and was not on the bar docket at the time the motion to set aside the default was made and determined.

That the attorney had been watching for the cause, and had gone out a short time, when other business was occupying the attention of the court, when he afterwards understood the case was called up, and defendant defaulted, and that as soon as he discovered that a default had been taken, he made a motion to set aside the default.

The city attorney filed his affidavit, stating that defendant's attorney's partner was present, at the time the defendant was called, and defaulted.

To this, a counter affidavit was filed by attorney for defendant, setting forth, that at the time of the employment of him, by defendant, he had no partner, and that his then partner, so far as he knew, knew nothing about the case, and had nothing to do with it.

This was all the evidence.

No other order appears in the case.

The cause is brought here by appeal, and the following errors assigned:

1. The court erred in defaulting appellant and dismissing her said appeal.

2. The court erred in refusing to set aside said order dismissing said appeal upon the affidavits, and for the reasons stated.

3. The proceedings are otherwise informal and erroneous.

MR. A. G. KIRKPATRICK for the appellant:

1. This case, so far as the appeal is concerned, is governed by the act of 1861, (Session Laws, 15,) appeals from police magistrates being allowed in the same manner as [*375] appeals from justices of the peace. (Session Laws, 1854, 13.)

The act of 1861 is entitled, "An act to change the practice in appeal cases," and provides "that in *all* cases of appeals from justices of the peace, perfected ten days before the commencement of the term in appellate court, the appearance of the appellee may be entered in writing, and be filed among the papers in the case; and if such appearance is so entered ten days before the commencement of the term, the case shall stand for trial at said term."

If it was intended to apply simply to appeals taken before clerks of Circuit Courts, it would have said so; but it says *all* cases.

It was intended to be a mutual thing, and appellee was not, until he was in court, in a position to take any steps against defendant. *McConnell* v. *Fulton*, 19 Ill., 570.

Now the design of the legislature evidently was, that the appellee should in *all* cases be brought into court, otherwise the provision authorizing the appellee to enter his appearance would be without design or effect; and the further provision, that in such instances, "the case shall stand for trial at said term" would have no meaning. It would not be "an act to change the practice in appeal cases," but leave the practice just as it was before, except to authorize the appellee to do a certain act which he was not bound to do in order that the case should "stand for trial." We, therefore, think that the appellee was bound to enter his appearance ten days before the commencement of the term in order to force the appellant to trial. This he did not do; nor was he before court in any other manner whatever, so that appellant had no notice that appellee intended the case should be tried.

The case of *Boyd* v. *Kocher*, 31 Ill., 295, was decided under the law as it stood prior to the passage of the act of 1861, and, as would appear from the note of the reporter thereto, in full view of the fact that the law had been changed. The law of 1861 was passed for the purpose of preventing just such a surprise as has been taken here upon the appellant.

The Circuit Court should have set aside the default in [*376] this case, for the foregoing reason, as well as the reason that the default was a surprise upon the appellant. It was taken at a time when her attorney was absent a short time from the court room, when the case had never been placed upon the bar docket, and had just been placed upon the judge's docket. The appellant

had in the meantime performed every act necessary for her to do by the rules of the court, and if she did not pay the docket fee, and have the case entered upon the docket, that was no reason, under the practice in that court, why her rights should be prejudiced. It is true that this was a matter addressed to the discretion of the court. But it is a discretion which should be exercised according to the rules of justice and equity, and courts of justice should not allow a party to be turned out of court by a surprise, such as was taken upon appellant here.

Mr. F. F. BROWER for the appellee:

1. The statute of 1861 has no reference to appeals taken and perfected before justices of the peace or police magistrates. It refers wholly to appeals perfected in "appellate court."

It was no error in court below to allow appellee to put the case on docket and dismiss the appeal at the term at which it was dismissed. *Boyd v. Kocher*, 31 Ill., 295.

2. The statute of 1861 has no reference to appeals from police magistrate courts; it only refers to appeals from justices of the peace, and could affect in no way appeals from police magistrates, unless they were specially named therein. *Newkirk* v. *Chapron*, 17 Ill., 344.

3. The statute of 1861 refers only to the manner in which an appeal case may be heard in the appellate court, at the first term of court after the appeal is taken, and not to subsequent terms of court.

4. The other matter presented by the record in this case are questions to be decided entirely at the discretion of the [*377] court below, and not properly noticeable by this court. *City of Chicago* v. *Adams*, 24 Ill., 492; *Erissman* v. *Erissman* 25 Ill., 136.

Messrs. STRAIN & KIDDER, also for the appellee, presented the following:

1. The court properly defaulted appellant and dismissed her appeal.

This was an appeal from the police magistrate of the city of Monmouth, and perfected according to the provisions of section 60 of the 59th chapter Revised Statutes, 1845, by filing the appeal bond in the office of the police magistrate, and no summons is required to be issued to the appellant. Each party is bound to take notice of and follow up the appeal, and both parties are to be considered in the appellate court at all times and for all purposes. *Boyd* v. *Kocher*, 31 Ill., 295; *Wells* v. *Hicks*, 27 Ill., 343.

The appellant insists that the act of 1861, entitled "An act to change the practice in appeal cases," (Session Laws, 15,) which

provides "That in all cases of appeals from justices of the peace perfected ten days before the commencement of the term in the appellate court, the appearance of the appellee may be entered in writing, and be filed among the papers in the case; and if such appearance is so entered ten days before the commencement of the term, the case shall stand for trial at said term," has changed the practice in regard to this class of cases.

Now the act of 1861 no where provides that a summons shall issue to the appellee, in any case, by direct terms or by any reasonable implication. It is evident that it was the design of the legislature to leave the law as it stood by chapter 59, Revised Statutes, 1845, as to issuing a summons to the appellee. And only in that class of cases provided for by section 61, chapter 59, Revised Statutes, where the appeal is perfected by filing the appeal bond in the office of the clerk of the Circuit Court, was it and is it now necessary that a summons to the appellee should issue. And that the entering of the appearance [*378] of the appellee in writing and filing the same among the papers of the case ten days before the commencement of the term in the appellate court, in order to have the same stand for trial at such term, is now necessary only in all cases of appeal of the latter class, when the proper summons had not been issued or service had not or could not be made on the appellee.

In the first class of cases, the appellee is at all times and for all purposes in the appellate court, and bound to take notice of and follow up the appeal. There is no necessity whatever for summons to the appellee to bring him into court, when he is in court by operation of law. There is nothing in the opinion of the court in the case of *Boyd* v. *Kocher*, 31 Ill., 295, to indicate that the law had been changed in regard to that class of cases.

2. The court properly refused to set aside said order of default dismissing said appeal on the case made by the affidavits.

The judgment before the police magistrate was rendered against appellant May 28, 1863, and the appeal taken and transcript and papers filed with the clerk of Circuit Court June 2, 1863. Great delay followed. Two terms of the Circuit Court passed, and until the third term no attempt was made by appellant to put the case on the docket by paying the docket fee required by the act of the legislature. Nor did appellant's counsel, by any act, make it known to the appellee's counsel that he was acting as appellant's counsel or had anything to do with the said appeal until three days after the default, and order dismissing the appeal was entered. The partner of appellant's counsel was present in court attending to their business — but this retainer was so private that even the partner could not know it. (See affidavit of Almon Kidder, appellee's counsel, on file.)

The affidavits of appellant's counsel on file no where show or allege that appellant was not guilty of the charges preferred, or had any defense of any kind to the same, while [*379] the affidavit of appellee's counsel on file showed to the court that the appellant was engaged in the unlawful selling of intoxicating liquors. That the prosecution was commenced against appellant for selling intoxicating liquors to some small boys, whereby they became intoxicated. That appellant was guilty of the charges preferred beyond doubt. It was a matter entirely in the discretion of the court to set aside the default and order dismissing the appeal on the case made by the affidavits, and failure of appellant to docket the appeal and prosecute it with effect. And a sound discretion was exercised by the court in refusing to set aside such default when it appeared to the court that appellant was guilty of the charges preferred, and had failed to docket the case for trial.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was a prosecution before the police magistrate of the city of Monmouth, in the county of Warren, for a violation of certain ordinances of that city. The magistrate found the defendant guilty and rendered a judgment against her, from which she took an appeal to the Circuit Court, executing the appeal bond before the magistrate. The transcript and papers were duly sent up to the Circuit Court on the 2d day of June, 1863, the conviction having been had on the 28th day of May preceding.

When the cause was regularly called for trial in the Circuit Court, at the October term thereafter, and no person appearing for the appellant, the appeal was dismissed and a *procedendo* awarded.

At the same term, the defendant entered her motion to set aside this order of dismissal and reinstate the cause on the docket, which motion the court denied, to which the defendant excepted, and appealed to this court.

The motion to set aside the order dismissing the appeal was based upon the affidavit of appellant's attorney, that he had [*380] been "watching" the case, and had gone out of court a short time when other business was occupying the attention of the court, when he afterwards understood the case was called up, and defendant defaulted, and as soon as he discovered this, he made the motion to set aside the default.

The record shows that the cause was not called up out of its order, but was called for trial, and no person appearing for the appellant, the court could not do otherwise than dismiss the appeal. The appeal having been perfected before the magistrate, it was not necessary a summons should have issued to the appellee.

Syllabus.

The party appealing is bound to follow up his appeal, and so is the appellee as in an appeal taken from the Circuit Court to this court. *Boyd* v. *Kocher*, 31 Ill., 295.

We do not perceive that the act of 1861 changes this rule, the position in which this case stood being considered. It was regularly called for trial, and no appearance by the appellant.

The affidavit on the motion to set aside the default does not show any merits. In such motions, the court has a discretion to grant or refuse them, and its action on the motion cannot, therefore, be assigned as error. *Ferguson* v. *Miles*, 3 Gilm., 363.

The point is not made here, as to the propriety of dismissing the appeal where the docket fee is not paid by appellant, so as to entitle him to place his cause on the docket. In the case of *Edwards* v. *Dooling*, decided at Springfield, January term, 1865, this court held, where the docket fee was paid by appellee, for the purpose of placing the cause on the docket, it was irregular to dismiss the appeal before a rule *nisi* is taken against appellant to the effect, if he did not refund the docket fee to appellee, by a day named, the appeal should be dismissed.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

NIANTIC BANK *et al.* [*381]

v.

ROBERT B. DENNIS.

1. REDEMPTION—*by one creditor from another in equity.* The M. & M. Bank recovered a judgment in the name of King, its attorney, in November, 1853, against Davidson, who held a tract of land under a perpetual lease with the right to purchase the fee at a fixed price. In January, 1854, Dennis recovered judgment against Davidson. In February, 1854, the bank, having an unrecorded assignment from Davidson, older than either judgment, of his lease, paid the purchase price and received a deed from the owner of the fee, and then recorded the assignment and deed. In May, 1857, the land was sold under the King judgment. In August, 1858, Dennis recovered another judgment against Davidson, and redeemed from the sale under the King judgment and obtained a Sheriff's deed. Dennis had sold in May, 1856, under his first judgment but had not taken out a deed. He now filed a bill to redeem the legal title from the M. & M. Bank and its assignees. *Held*, that he could redeem by paying what the bank had paid for the legal title, and interest and taxes.

2. JUDGMENT LIEN. The lien of a judgment upon an equitable estate in land belonging to the judgment debtor is not affected by the fact that the instrument under which the equity arises is not recorded.

3. ESTOPPEL—*by acts in pais.* If a judgment creditor causes land belonging to the judgment debtor at the date of the judgment to be levied on and sold under an execution issued upon the judgment, he cannot, as against a purchaser at the Sheriff's sale or redeeming creditor, insist that the judgment was paid at the date of the sale, and its lien destroyed.

4. EXECUTION—*presumption in regard to its issue.* The presumption is, in

the absence of proof, that a clerk issues an execution only under the direction of some person authorized to control the writ.

APPEAL from the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

This was a bill in chancery filed by Robert B. Dennis against the Niantic Bank *et al.* to redeem certain real estate. The facts are fully set forth in the opinion of the court.

Messrs. KING & SCOTT for appellants.

MR. W. T. BURGESS for appellee.

[*382] MR. JUSTICE LAWRENCE delivered the opinion of the court.

On the 19th of October, 1846, one Daniel Davidson leased from one Richard R. Swift, the undivided third of a certain tract of land situate in Cook county, forever, at an annual rental of one hundred dollars. There was a provision in the lease that whenever Davidson should pay Swift seven hundred dollars the latter would deed him the premises.

On the 9th of March, 1853, Davidson assigned the lease to one Bronson, cashier of the Merchants & Mechanics' Bank, to hold as security for any indebtedness Davidson might contract at the bank. The assignment was not, at that time, recorded. On the 28th of November, 1853, Davidson then being indebted to the bank over $4,000, it took judgment against him on one of his notes, in the name of King, attorney of the bank, the judgment being for $1,017.76, and rendered in the Circuit Court of Cook county. Execution was duly issued.

On the 23d of January, 1854, Dennis, the complainant in this case, recovered a judgment in the Cook County Common Pleas against Davidson, for $6,025. An execution was duly issued, and the premises in controversy were afterwards, on the 12th of May, 1856, sold under this judgment. There was no deed made and delivered under this sale, and the judgment is therefore important, for the purposes of this suit, only so far as its existence explains subsequent transactions.

On the sixth of February, 1854, Bronson, in behalf of the bank, paid Swift the $700 stipulated in said lease as the purchase money, and received from him a conveyance of the premises. This was done with the consent of Davidson, and the land was taken by the bank in satisfaction of the debt due to it from Davidson. The original lease and the assignment thereof as security to Bronson, were now recorded in the Recorder's office for the first time, together with the deed to Bronson, the record bearing date February 6th, 1854.

On the 5th of May, 1857, an execution was issued on [*383] the King or bank judgment, and levied on the premises in controversy. The premises were struck off to King, the attorney of the bank. The judgment had been once assigned by King to Fitch & Hewes, but on the 7th of April, 1857, they had re-assigned it to Wentworth, the president of the bank. It must therefore be considered as belonging to the bank at the time the execution was issued.

On the 27th of August, 1858, Dennis, the complainant, recovered another judgment against Davidson for $9,295, and on the same day, sued out an execution and redeemed from the sale to King, under the King or bank judgment, paying $652.80 redemption, and on the 13th of September, 1858, the premises were again exposed by the Sheriff, at public sale, and there being no higher bid than the redemption paid by Dennis, they were struck off and deeded to him by the Sheriff. He then filed his bill to redeem, and procure a conveyance of the legal title which had passed from Swift to Bronson, as cashier of the Merchants & Mechanics' Bank, making all persons interested parties, and by an amendment bringing in the Niantic Bank, to which the Merchants & Mechanics' Bank had sold and caused the premises to be conveyed on the 20th of July, 1858. The court allowed the complainant to redeem by paying the $700 and interest, which the bank had paid Swift for the legal title, and all taxes paid by the bank and interest, the whole amounting to $1,549.35. The defendants below bring the record to this court, and the complainant below assigns cross-errors. There were some other sales of the premises made by the Merchants & Mechanics' Bank, before the final sale to the Niantic Bank, but we have stated all the facts material to the disposition or proper understanding of the case.

From what has been said it appears that the eldest lien on the premises was the bank judgment in the name of King, its attorney, against Davidson, in November, 1853. The second lien was the judgment in favor of the complainant, Dennis, [*384] of January 23d, 1854. The assignment of the lease from Davidson to Bronson, as security for the bank, was, in fact, prior in time to both of these judgments, but not being recorded until February 6th, 1854, it became junior to both as to third persons without actual notice, and it is not pretended that Dennis had such notice. The lien of these two judgments upon the equitable estate of Davidson was in no wise affected by the fact that the lease, under which that estate arose, was not recorded. Neither, under our statute, was it affected by the fact that his estate was equitable instead of legal. His right and interest in the land, whatever they were, were bound by the judgment. When, therefore, the Merchants & Mechanics' Bank paid up the $700 and

procured a deed for the legal title from Swift, if, as is urged by their counsel, and as we presume was the fact, that conveyance was taken by the bank in full satisfaction of its claims against Davidson, including its judgment, it then left the Dennis judgment of January, 1854, the eldest lien upon the land, and held its own title subject to that judgment. In 1857, the bank having negotiated a sale of the premises, and been unable to complete it on account of the condition of the title, sued out an execution upon its judgment, with the view, we presume, of perfecting its title by procuring a Sheriff's deed under that judgment as the eldest lien. Had there been no redemption from the sale, this object would have been accomplished, but Dennis redeemed, and procured a deed, thus occupying the same position that he would have held had he been the purchaser instead of the bank, at the Sheriff's sale upon the bank execution. Dennis, therefore, has title under a judgment which was the eldest lien upon Davidson's equitable estate. It is impossible to give a valid reason why he should not be permitted to refund to the bank what it has paid Swift, and thus convert this equitable estate into a legal one, such payment having been made by the bank by virtue of the rights it derived from Davidson. So far as the rights of Dennis are concerned, they are the same that they would be, had the legal title remained in Swift.

[*385] It is urged by the counsel for the appellants, (the King or bank judgment having been in fact paid by the arrangement between Davidson and the bank, when the lease was assigned to the latter,) that nothing passed by the sale under that judgment, either to King as the purchaser, or to Dennis as redeeming creditor. Even if this were true, and this judgment were to be regarded as a nullity, Dennis would still be at liberty to take out his deed under the sale on his first judgment, and thus cut off the bank. But whether true or not, it is a question which neither the Merchants & Mechanics' bank, nor any person claiming under it, can be permitted to raise. By the most solemn acts which it could perform in connection with that judgment, it proclaimed to the world that it was not paid. It sued out an execution, it levied the execution upon these premises, it caused them to be offered to the public for sale, it had its attorney to bid them in for $580.26, and all these facts appearing upon the official records, after a third person, relying upon the facts thus disclosed, has come forward and redeemed from this sale, the bank comes in and says, the sale was all a sham, and this judgment upon which we offered this land for sale, had already in fact, been paid. Can any argument be needed to show that the bank cannot be permitted to hold this language? If the owner of land is estopped from asserting his title because he has been silent when good faith

required him to speak, shall he not be estopped who has been, not merely passive, but active, in deceiving others? We do not suppose the bank was seeking to deceive. It was a race between creditors. But in seeking to protect its own interests, it did so act as to deceive third persons. It treated this judgment as having a valid existence, and it cannot now be permitted to say it had not. It was not the interest of Dennis to be obliged to redeem. If this judgment was paid, as the bank now claim, Dennis might have fallen back upon his first judgment, as the eldest lien.

Neither is it true, as urged, that if the judgment was paid, King took nothing by the sale, and Dennis in redeeming, was only subrogated to whatever rights King had. Den- [*386] nis, by redeeming, took whatever rights the official records disclosed in King, unaffected by any secret equities that might have affected King. He occupied the same position he would have held, had he been an innocent purchaser at the sale. If the judgment had been in the name of the bank, perhaps a different case would have been presented. The question would then have arisen whether the acquisition of the legal title by the bank from Swift did not destroy the lien of its own judgment, by considering the legal title as relating back to the assignment of the contract by Davidson, and thus overreaching and merging the judgment. But with the judgment standing in the name of King, and with no knowledge on the part of Dennis that it really belonged to the bank, when he found the premises had been sold under that judgment he had the right to believe, and to act on the belief, that the judgment was an existing lien in favor of King, prior in date to the legal title of the bank under Swift's deed, and prior to the record of its equitable title under Davidson's assignment.

But it is urged that there is no evidence that the bank, or its attorney King, ordered out the execution on which the land was sold. There is no evidence that they did not, and the presumption is, in the absence of proof, that a clerk issues an execution only under the direction of some person authorized to control the t. It would be a misfeasance in office were he to do otherwise. sides, King bid in the property at the sale, paid up the costs, and t once notifies Woodworth, the president of the bank, what he has done. There can be no doubt then, but that the bank must be held chargeable with causing the execution to issue.

We think the redemption was allowed by the court below on the right basis, and the cross errors are not well assigned. It is but simple equity that Dennis should refund what the bank was obliged to pay Swift for the legal title. On that title Dennis had no lien. He could only have reached it, by doing precisely what the bank did. Had not the bank paid Swift, he

[*387] would have been obliged to do so in order to turn his equitable into a legal estate. Neither is he entitled to a credit, as urged by his counsel, for the redemption money paid by him. That payment was his voluntary act, and by it he acquired his title. It is the only perfected title acquired by him, even to the estate of Davidson. The deed under the first judgment he has never taken out. He cannot be permitted to claim his title under the redemption, and at the same time be permitted to claim that the money paid is not to be treated as redemption money, but to be applied to some other purpose. If it it is not to be so treated, he is not yet in a position to ask the decree of this court. To claim title under the redemption and at the same time to claim that the money paid shall be applied to another purpose, is not unlike the inconsistency of the bank in selling under a judgment, and then claiming it was paid. The decree of the court below was in all respects right and is affirmed.

Decree affirmed.

FRANCIS B. NICOLL
v.
CHARLES H. MILLER *et al.*

1. REAL ESTATE AND PERSONALTY—*where lands assume these distinctive characters.* Where real estate is purchased by several, and procured to be conveyed to one of the number to be held by him in trust for all, for purposes of speculation and sale, upon such terms that the *cestuis que trust* have only a right to the proceeds thus arising, the right of the *cestuis que trust* is a personal right—the property is personal property.

But if the trustee thus holding the title, convey the property to others of the beneficiaries, by consent of all, simply as "trustees," without declaring any specific trust, the effect of such conveyance will be to create a naked trust, vesting the legal title in the grantees to hold simply for the use of the *cestuis que trust*, and subject to a demand by them at any time for a conveyance. The prop-
[*388] erty thus becomes reconverted into its original character of real estate, creating in the *cestuis que trust* an equitable estate of inheritance.

2. DOWER—*to what character of estate it attaches.* The equitable estate of inheritance so created in the *cestuis que trust* becomes at once subject to the dower right of their wives.

3. SAME—*how such right may be divested.* The inchoate right of dower having once attached, it cannot be divested in any mode except that prescribed in the statute. No subsequent declaration of a specific trust by the *cestuis que trust*, can restore the property to its former condition of personal property so as to affect the right of dower, nor by relation, change the character of the conveyance by means of which the right originally attached.

4. TRUSTS—*effect of a failure of one of several trustees to act.* Where a conveyance is made to several, in trust, the failure of one of the co-trustees to act, will not defeat the conveyance.

5. SAME—*equity will preserve the trust.* In such a case, equity will entertain jurisdiction for the purpose of preserving the trust,

6. Mr. JUSTICE LAWRENCE dissents from the conclusion arrived at by a majority of the court in this case, holding that under the testimony of a witness, taken in connection with the conveyance from the original trustee and the subse-

quent declarations of a specific trust, all those instruments should be regarded as one, thus preserving the character of the trust as originally created, and the condition of the property as personalty.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This suit is founded upon the same transactions and written instruments as that of *Nicoll* v. *Ogden et al.*, 29 Ill., 323, and was brought by the appellant to recover dower in a lot which is a part of the property called in the former suit, "the trust half of the Hunter property," in which the appellant claims her husband, Edward A. Nicoll, had an equitable estate of inheritance.

That estate in her husband is claimed to have been created by the conveyance of the 1st of April, 1842, from Butler to Nicoll & Bushnell.

It was admitted in the answer and the stipulation made in the case of *Nicoll* v. *Ogden et al.*, that the conveyance of the 1st of April, and the two instruments of the 12th and 25th of the same month, declaratory of the character of the trust, were [*389] executed and delivered at about the times of their respective dates, and not simultaneously, as parts of an entire transaction.

In this case, the making and due execution of these instruments is admitted in the answer and stipulation, but no admission is made respecting the date of the actual delivery of them.

In addition to the testimony upon which the former case was decided, the defendants in this suit have taken and read in evidence the deposition of Orsemus Bushnell, one of the trustees in the deed from Butler. And they insist that by his testimony the important feature of this case, differing from the former, is established; that the three instruments of the 1st, 12th and 25th of April, were all delivered and took effect together, as parts of an entire transaction, on or about the 25th day of April, 1842, the date of the paper which was made and executed last, and whether that fact is established, and the character of the property as personalty remained unchanged, is the principal question presented by the assignment of errors.

Mr. Bushnell's testimony referred to, is as follows:

Question. What is your name, age, and occupation and residence?

Answer. Orsamus Bushnell; I am sixty-two years of age, and a lawyer by profession, have been practising law since 1825; and residence, Westchester county, New York; place of business, New York City.

Question. Who of the parties to this suit do you know; and how long have you known them, respectively?

Answer. William B. Ogden, since 1826; Mahlon D. Ogden, since about 1835; Edwin H. Sheldon, since about the same time; Charles Butler, for forty years, at least; Eliza A. Butler, about twenty-five years. I do not know, and to my recollection, have never known any of the other parties.

[*390] *Question.* Look at the instrument now shown you, dated April 1st, 1842, made by Charles Butler, and Eliza A., his wife to Edward A. Nicoll and Orsamus Bushnell, and which is referred to as "Exhibit number three," attached to the bill of complaint in this cause, and found on pages thirty-nine, forty, forty-one, of the printed record of this cause; also, look at the instrument dated April 12th, 1842, executed by Edward A. Nicoll and Orsamus Bushnell, entitled a declaration of trust, and which is found on pages three and four of the printed record of this cause, and there set out as a part of the bill of complaint; also, look at the instrument now shown you, dated April 25th, 1842, executed by John S. Bussing, Edward A. Nicoll, W. B. Ogden, B. F. Butler, Charles Butler, Chester Clark, Barton White, and which is referred to as "Exhibit number four," attached to the bill of complaint in this cause set out on pages forty-two, forty-three, forty-four, and forty-five, of the printed record in this cause, and state what facts are within your knowledge with regard to the time, manner, and place of the execution and delivery of said deeds or instruments?

Answer. On the 1st of April, 1842, the date of the first deed mentioned, I was residing in the city of New York, attorney and counselor at law, and I believe the other parties to this deed, viz: Edward A. Nicoll, Charles Butler, and Eliza A., his wife, were also residing in said city. I recollect having been applied to about that time for my consent to become joint grantee with Edward A. Nicoll for the lands described in that deed, from said Butler and wife, on the terms then proposed to me, which was a trust; which trust, I think, is more fully set out in other papers. I remember, that in pursuance of that consent of mine, this deed was executed, I think, to me, but might have been to Mr. Nicoll; but came under my observation on or about the 9th day of April, in the last mentioned year. Upon the deed last spoken of coming into my possession, a declaration of trust was prepared and

[*391] executed by Edward A. Nicoll and Orsamus Bushnell, bearing date on the 12th day of April, in the last mentioned year, which is the paper, as I understand, secondly mentioned in the question. This last declaration of trust was delivered by Mr. Nicoll and myself to the parties interested in the trust. At that time, and, I think, all the time while I was talking to the parties about the subject of the trust, I expressed to them an unwillingness to act as trustee under the powers and express trust mentioned

in the two former deeds or instruments, and exacted and was promised a paper more fully defining my powers as a trustee; and I think I required and drew myself the deed or instrument dated the 25th day of April, in the last mentioned year, which was duly executed and delivered to me; whereupon, and not before the execution of this last mentioned paper, although I had previously consented, provided this paper should be executed, I entered upon the trust, and conducted it to the best of my knowledge and ability, in connection with Mr. Nicoll, to such time as Mr. Nicoll absconded from New York, the date of which time I do not remember. After Mr. Nicoll left New York, proceedings were taken, as I understood and believe, by which an order was obtained through one of the courts of Illinois, authorizing me to close up that trust, irrespective of Mr. Nicoll. I proceeded to do so; and did so, as I understood it, many years ago.

Question. State whether you accepted the delivery of the deed of April 1st, 1842, referred to in the foregoing question and answer; and whether, or not, the instrument dated April 12th, 1842, referred to in the same question and answer, was, or not, delivered to the parties interested therein until after the preparation and execution of the instrument dated April 25th, 1842, referred to in said question and answer?

Answer. In general conversation with the parties interested, gave them to understand that I would accept those trusts, but I must have a paper more specifically defining my duties and trusts; and I am confident that I did not accept either of [*392] those papers of the 1st or 12th, unconditionally, nor act under them until I got the paper of the 25th of April, 1842, above referred to.

Question. Who had, during the time these negotiations were pending, from the 1st to the 25th of April, 1842, the possession of the respective papers above referred to?

Answer. I have no doubt but that I had, mostly; Mr. Nicoll may have had them in his hands occasionally, but I was the custodian.

Question. Who requested you to act as trustee in this business?

Answer. To the best of my memory, several united in the request. If I were to name any parties, after this lapse of time, I should say Mr. Charles Butler, and perhaps Mr. William B. Ogden.

Question. When the deed of April 1st, made by Mr. Charles Butler, was delivered to yourself and Mr. Nicoll, was there any trust or power, or limitation proposed or discussed with reference to the lands, other than those recited in the declaration executed by yourself and Mr. Nicoll, and dated April 12th, 1842?

Answer. I have no doubt that all those papers were delivered

to me at one time, as an effective delivery — what I mean, as a lawyer, as an effective delivery, I had not accepted them, nor accepted the trust, except as stated in my direct examination, until I got that paper of the 25th. All the trusts, and my reasons given for them at the time, were discussed up to the time and when I got the paper of the 25th.

Question. With whom were they discussed?

Answer. With Mr. Nicoll and Mr. Charles Butler; Mr. Edward A. Nicoll, I have no doubt.

Question. I gather from your statements, that you have no distinct recollection at this time, as to the individual gentlemen with whom you conversed on the subject of the trusts,
[*393] but that you infer, from the circumstances, that it was with the persons you have named and alluded to?

Answer. Your inference is wrong. I have a distinct recollection of talking with Mr. Butler and Mr. Nicoll about it. It was the subject of conversation, several times repeated; my reasons for it, given at the time, I distinctly remember, and refused to accept the trusts except upon those conditions at the time.

Question. Were the three instruments alluded to severally executed on the day that they respectively bear date?

Answer. I do not know, and never did know.

Question. Did the declaration of April 12th, 1842, embody all the powers and duties of the trustees, as understood by the parties in interest?

Answer. That I do not know.

Question. Did you prescribe any condition to your acceptance of the trusts, further than those embodied in the paper dated April 12th, 1842?

Answer. I prescribed, or exacted, the paper of the 25th of April, 1842, which I think varies from that of the 12th of April, 1842; but I have not examined to see in what particulars exactly.

Question. State what, if any, conditions to your acceptance of the trust you insisted upon different from those expressed in the paper of April 12th, 1842?

Answer. I cannot now recollect what were the specific reasons given by me at the time, or what I insisted upon; I know I exacted and required that paper; the reason I gave at that time, I could not now repeat or remember distinctly.

Question. Is it, or not, your recollection or impression that the conditions you made to your acceptance of the trust were, that you should not have to go to Chicago to attend to the business in person, and that you should not be responsible for your co-trustee's acts or defaults?

[*394] *Answer.* I have no doubt but that I made those conditions at the time; my recollection is that I did.

Question. Do you recollect that you insisted upon anything except that these conditions should be assented to by the *cestuis que trust?*

Answer. I don't recollect insisting upon that assent of the *cestuis que trust*, yet I may have done it. I may have made that one of my points, yet I do not remember distinctly.

Question. Do you remember to have made any conditions to accepting the trust, except those named in my last question but one; if so, please name them?

Answer. I don't recollect what my specific reasons were at that time. I do recollect that I required that third paper of the 25th; and I generally remember, very distinctly, that I refused to act until I got it; but the exact specific reasons I then had for doing so, I cannot now put in words. I don't remember.

Question. Do you remember, that in point of fact, you did insist upon any other conditions, or different conditions, to your acceptance of the trust than those named in my third previous interrogatory?

Answer. I do not specifically, unless the provisions or conditions vary from that contained in the paper of the 25th; as to which I am not at this moment prepared to speak.

Question. As a matter of memory, do you recollect, as conditional to your acceptance of the trust, you required any other terms, distinct from those named in fourth previous interrogatory?

Answer. As a matter of memory, I don't remember exacting, conditionally to my acceptance of the trust, any condition or provision not expressed in the paper of the 25th of April. If that is identical with those mentioned in the question, then I must answer the question in the negative. I do not remember.

Question. Who, to the best of your knowledge, pro- [*395] posed the original draft, and in whose handwriting is the paper of the 25th of April, 1842, which appears to have been executed by the parties thereto?

Answer. To the best of my knowledge, I prepared the draft, and the paper is in the handwriting of B. W. Kirkham, Esq., of New York; he was then, and had been for a long time previous, and is yet, a copyist for me.

Question. After recalling the transaction so far as you can, please state whether the papers, respectively dated April the 1st, 12th, and 25th of April, 1842, referred to in your preceding examination, were delivered by and to the parties entitled to make or accept delivery of them at different times, or simultaneously, as parts of one transaction; and if the latter, at what date was such delivery made?

Answer. I have no doubt that I saw the papers of the 1st, also

the papers of the 12th — may have had them in my hand, and read them; I believe I did, and discussed them, before the 25th of April, and I have no doubt that they were not delivered, or accepted by me until the 25th; and I think and believe the transaction was closed on or about the 25th, and the papers exchanged as a part of one transaction.

Question. When you speak of delivery, or an effective delivery, of the papers, I understand you to refer, not to a manual delivery, but to an operation of the mind, which, as a lawyer, you deem essential to a legal delivery. Am I correct?

Answer. No sir.

Question. Will you explain, then, what you mean by an effective delivery?

Answer. I mean an exchange of the papers after the minds of the parties have met — a consummation of the transaction.

Upon the case as thus presented, the court below entered a decree dismissing the bill, from which the complainant took this appeal, and now assigns the same as error.

[*396] Messrs. ARRINGTON & PEABODY for the appellant.

The present case is substantially the same as that of *Nicoll* v. *Ogden*, reported in 29 Ill., p. 390. That case, after being elaborately argued, and a long advisement by this court, was decided in favor of Mrs. Nicoll. A powerful printed petition for a re-hearing was then presented by Judge Beckwith; to which two printed replies were offered in opposition, and after another protracted advisement, a re-hearing was denied. Hence, one might fairly suppose the question to be fully at rest. But unfortunately the fact has not accorded with the inference. For, subsequently to the mandate in the case of *Nicoll* v. *Ogden*, the deposition of Orsamus Bushnell, co-trustee of Edward A. Nicoll, was taken; and by stipulation was transferred into the present case, all the other facts in the two cases being the same. So that the only question now tendered for solution is: Can the deposition of Bushnell have the effect of changing or modifying the result attained by the decision in *Nicoll* v. *Ogden?*

We assume the negative, and in support of our position, adduce the following reasons:

1. Mr. Bushnell's deposition shows that the deed of April 1st, and the declaration of trust of April 12th, were *delivered* to him, (and were *retained* in his custody,) about the times of their respective dates.

2. The same deposition shows that Mr. Bushnell would not consent to act in the execution of the trust until he procured from the beneficiaries the paper of April 25th.

3. The entire deposition shows that the paper of April 25th

was executed at the special instance of Mr. Bushnell, and for no other purpose than to induce him to go on with the performance of the trust.

These are the additional facts apparent on the face of the deposition, when stripped of the legal conclusions and illegal insinuations of the witness. And taking them as true, we submit, that according to Mr. Bushnell's own statements, [*397] the deed of April 1st, and the declaration of trust of April 12th, were delivered at or about the times of their dates, and long before the paper of April 25th.

This is demonstrable from many well settled legal rules, a few of which we will now enumerate:

1. The deed of April 1st was delivered to the grantee in the trust. But a deed cannot be delivered to the grantee conditionally, or as an escrow. 4 Kent's Comm., 458; *Jackson* v. *Catlin*. 2 Johns., 32; *Neely* v. *Lewis*, 5 Gilm., 32.

2. The deed of April 1st was not for the benefit of Mr. Bushnell at all, but for that of the *cestuis que trust*. The delivery was for them, not for him. And a deed may be delivered to even a third person, (which in an equitable sense Mr. Bushnell was,) for the use of the grantee. *Church* v. *Gilman*, 15 Wend., 660; *Verplanck* v. *Stevry*, 12 Johns., 551, 552.

"Delivery, in the legal sense, consists in the transfer of the possession and dominion, and it is complete at the moment when the deed is in the hands or power of the grantee, with the consent of the grantor, and with his intent that it should operate and inure as a muniment of title to the grantee." Greenleaf's Cruise, Vol. IV, p. 29, note 2; See 1 Greenleaf's Ev. sec. 568a, note 7.

But here the deed was delivered by Butler unconditionally for the use of the beneficiaries, to Bushnell and Nicoll, the latter being himself a beneficiary.

3. But suppose that Bushnell had been sole trustee, and had refused to act; that would not have defeated the trust. The Court of Chancery would have appointed a new trustee. Lewin on Trusts, 710; Hill on Trustees, 191; 2 Story's Eq. Jur. sec. 1061; *Wood* v. *Stone*, 8 Price, 613; Anon. 4 Sr. Eq. Rep., 700; *De Peyster* v. *Clendininig*, 8 Paige, 310.

Thus, in *Attorney Gen.* v. *Stevens*, 3 M. & K., 347, a new trustee was appointed where no person could be found answering the person described in the instrument of trust.

So we perceive that neither the assent nor the action of [*398] Mr. Bushnell was at all necessary to the validity of the deed.

We are, therefore, entitled to the full benefit of the opinion pronounced by this court in *Nicoll* v. *Ogden*, 29 Ill., 390; "that

an equitable estate of inheritance was designed to be executed be the deed" of April 1st, "and continued under the declaration and specification of trusts, dated the 12th and 25th, there can by no dispute; both these papers, in express terms, declare that the trusts shall be performed to the heirs of the *cestuis que trust.* This of itself is sufficient to show a design to re-convert the property into real estate."

Messrs. SCAMMON, MCCAGG & FULLER for the appellees.

In the case of *Nicoll* v. *Ogden*, 29 Ill., 323, it was admitted in the answer and the stipulation made, that the three instruments, the deed from Butler to Nicoll and Bushnell of April 1st, 1842, and the two declarations of trust of the 12th and 25th of the same month, were executed and delivered at about the times of their respective dates, and not simultaneously, as parts of an entire transaction.

In this case the making and due execution of these instruments is admitted in the answer and stipulation, but no admission is made respecting the date of the actual delivery of them.

The deposition of Orsamus Bushnell, one of the trustees, has been taken and put in evidence in this case, and it is insisted by the appellees, that it shows conclusively that those three instruments were all delivered and took effect together, as parts of an entire transaction, on or about the 25th day of April, 1842, the date of the paper which was made and executed last.

The great question in this case, growing out of the execution and delivery of those papers, considered in the light of Bushnell's testimony, is this: *did the parties by those instruments, re-convert their property, which, up to that time was personalty, into realty, so as to vest in the owners of it, equitable estates of inheritance, in which their widows are entitled to dower?*

[*399] It has been seen from the previous history of this property, that prior and up to April 1st, 1842, it was personalty, though in form real estate, or land; and as personal property, was to be enjoyed by the owners during their lives, and as such, it would descend to their personal representatives at their decease, and their widows would not be entitled to dower in that, more than in any other personal estate.

As the conversion of money into land must be made by some decisive and unequivocal act of the owners, so the re-conversion must be equally unequivocal with the original conversion, and all the owners must join in the act of re-conversion. Adams Eq., 137, side *Baker* v. *Copenbarger et al.*, 15 Ill., 103; 1 Leading Cases in Eq., 775 to p. 808 of the last edition in notes to *Fletcher* v. *Ashburner*, 1 Brown's Ch'y Reps., 497; 1 Story's Eq. Jur., sec. 790-1-2-3, and 1212 to 1214, *Pratt* v. *Taliaferro*, 3 Leigh, 419;

Walter v. *Ma*, 19 Vesey, 429 top; *Loughborough's Ex.* v. *Loughborough Devisee*, 14 B. Monroe, 549; *Craig* v. *Leslie*, 3 Wheaton, 563; *Beatty* v. *Byers*, 18 Penn. St., 105; *Griffith* v. *Rickets*, 27 Eng. Ch. Reps., 298, and note on p. 311.

We now proceed to consider the several instruments made in April, 1842, and see whether, by their express terms, or legal effect, a re-conversion of their property into land was intended or effected by the owners who were parties to those instruments.

It is agreed on all hands, that the property retained its character of personalty until April 1st 1842.

Until that time Mr. Butler held the legal title to the "trust half of the Hunter property," as it was originally vested in him, but he then became embarrassed, and for the purpose (as it would seem) of placing the "trust" property beyond the effects of his embarrassments, he, with his wife, executed the deed to Nicoll and Bushnell, dated April 1st, 1842.

This deed was a proper instrument to transfer the title, then vested in Butler, to Nicoll and Bushnell. The property being land, the legal title could only be transferred by deed. But it is apparent that this deed was not made to Nicoll and Bushnell for their own benefit, either jointly or separately, for [*400] two reasons: first, because it was made to them as trustees; and secondly, because they were to take and hold the property as joint tenants, and the whole was to go to the surviver, as in case of joint tenancy.

Nicoll cannot be supposed to have intended that his interest in the property should go to Bushnell and his heirs and assigns, as it would have done by the terms of the deed, had Bushnell survived him; nor did he, by anything that appears in that deed, intend to re-convert his interest into realty, nor could he do so, without the consent of the other owners.

The apparent and sufficient motive for making that deed was to take the title of the property from Butler, and thus secure it against any complication with his affairs, and place it in Nicoll and Bushnell, with the right of survivorship incident to other cases of joint tenancy; in which case the survivor would have a full and convenient power of disposition over the whole of the trust estate. But as yet, the two papers dated April 12th and 25th were not executed, and Bushnell swears that this deed of April 1st was not delivered until they were.

Another consideration, also, rebuts any presumption, that a re-conversion was intended to be made by that deed, which is this, that it was not for the trustee or trustees to re-convert the property; that could only be done by all the owners, and nothing that Nicoll did, or intended to do, could re-convert his own interest, even, until all the others joined him.

Nicoll had no greater or other interest in the property, under this deed, than he had before. It did not declare or ascertain his interest in it. He became, by its terms, a trustee with Bushnell, for the other owners and himself, but his own interest was the same while Mr. Butler held the legal title to the property that it was after the conveyance to Bushnell and himself, and if, before that, he had not an estate that would support his widow's claim for dower, he had not afterwards, for his own estate was of the same quality and had all the legal incidents as before.

[*401] Regarding this paper as held in abeyance until the execution of the one dated April 12th, we next inquire, whether that had any effect upon the character of the property? This paper shows who were the owners of the property which was conveyed by Butler to Nicoll and Bushnell, as trustees, and what share or portion of it belonged to each owner. It further provided that, whenever partition should be made of the premises, the trustees should convey his share to each owner, but partition was only to be made of such portion of the property as should not have been sold by the trustees before the partition. This left the power of sale in the trustees in full force, to be exercised at their discretion. They might sell all the land before partition, and divide the proceeds as money among the owners. Certainly, there was no re-conversion of that part of the property which the trustees might sell, and yet it seems clear that the property was all one thing or the other, either all personalty or all realty, all personalty until a partition had been made, and each owner's share conveyed to him in land, instead of the proceeds of the land when sold by the trustees.

But Bushnell swears that this paper did not satisfy him; that he wanted the owners of the property to declare and set forth the duties of the trustees more fully, and so the matter rested until the paper of April 25th was prepared.

This paper has some provisions in common with that of April 12th, in regard to a partition of the property, but it seems to have been especially designed to protect the trustees against liability for the acts of the agents whom they might employ to manage and sell the property.

The "objects and intents" of the trust vested in Nicoll and Bushnell are explicitly set forth in this instrument. The trustees were excused from "doing anything to effect a partition;" but when one was made by the owners, the trustees were to execute the proper deeds to vest the titles in the parties entitled to them under that partition, but the power to sell all or any part

[*402] of the property was still vested in the trustees, or their agents or attorneys, and the parties agreed, each with the other and with the trustees, to accept the proceeds of the sales

made by the trustees, as their respective shares of the property which might be sold.

The trustees might still sell all the property before partition, in which case the parties would take their shares in money or personalty before a partition was made.

The agreement was, in substance, this: that the trustees should still have the power to sell the property and divide the proceeds as before, but the owners would, if they could, within six months from April 1st, 1842, make a partition of all that which was not sold, and the trustees would then make the necessary conveyances to complete the partition.

We, therefore, submit that while the property was thus liable to be sold and the proceeds divided by the trustees among the owners, it retained the character of personalty, which the owners had originally stamped upon it, and that the several papers just above referred to, and considered, were not intended to work a re-conversion of the property, because they do not show such decisive and unequivocal acts as are necessary for that purpose, according to Adams on Eq., 137, side, and as is said in *Craig* v. *Leslie*, 3 Wheaton, 563, "that it is the *election*, and not the *right* to make it, which changes the character of the estate, so as to make it real or personal, at the will of the party entitled to the beneficial interest." So here, the parties had a right to divide their property and take their shares in land, but they had not as yet done so; therefore it was not re-converted.

It must be kept in mind while considering this part of the case, that these papers are the only ones in evidence, which were made by or on behalf of all the owners of the property; that all of them must join in the "unequivocal" act which works a re-conversion; that the trustees could not re-convert it, and so the deed of April 1st, 1842, does not prove anything on this point, and that the subsequent assignments by Nicoll of his interest in the property to Anderson & Oakley being his sole individual acts, could neither make nor prove a re-conversion [*403] either of his portion or of that which belonged to the others.

We submit, in this connection, so much of the opinion of the court in the case of *Nicoll* v. *Ogden et al.*, as is found from page 379 to page 386, 29 Ill. Reps., where the late Chief Justice seems fully to sustain the views we have presented above, as to the legal effect of the papers made in April, 1842.

Most of the cases found in the books, involving the law of conversion and re-conversion of property, have grown out of the provisions of wills and marriage settlements; but the law is the same, where the questions arise upon deeds or contracts, as was stated by the court in 14 B. Monroe, 549, cited above, and where

the difference between the law on this subject, as applied to wills and deeds, is stated to be this: that in case of wills the conversion takes place upon the death of the testator, "while the deed speaks from the date of its delivery." So that, if the instruments made in April, 1842, did not effect a re-conversion of the property at the time of their delivery, they never did, and some further act of all the owners was necessary to effect that object.

"If an estate is directed to be sold, and the proceeds divided among several persons, a re-conversion cannot be effected until all are willing and competent to join, for the duty imposed on the trustee is to convert the entire estate, for the benefit of all, and that duty continues until countermanded by all." Adams' Eq., 137, side and note; *Baker* v. *Copenbarger*, 15 Ill., *Jennings* v. *Smith et al.*, 29 Ill., 116.

This property was, therefore, money for all, or land for all the owners, until all had agreed, by some unequivocal and decisive act, to change it from one to the other. *Willing* v. *Peters*, 7 Barr, 287, 290; *Wheldale* v. *Partridge*, 5 Vesey, 188 and notes.

But the touchstone of this matter is accurately stated by Adams, as follows: "A mere declaration that the property shall be converted," (or re-converted,) "is immaterial, for it is not the *declaration*, but the *duty* to convert, which works the equitable [*404] change," page 136 and note. And that must be applied to this case as follows: under the original agreement of the owners, their land was to be considered money, because it was vested in the trustees, coupled with a *duty* to convert the land into money. Under the April instruments, the power to sell was continued; and when sales were made, it was their duty to divide the proceeds among the owners; but there was no duty imposed upon the trustees to divide the land among the owners, but only to convey it to them, when the latter had made partition of it; so we submit, that the trustees held the title to the property as personalty, and as such, the owners were entitled to it, until the latter had made a partition of it, and demanded conveyances from the trustees to consummate the titles under the partition.

See further to this point, Adams 156, where he says that no conversion (or re-conversion either) is effected, unless it is directed by an *imperative* trust, for, if the trustees may exercise a discretion in making a change, there is no duty imposed on them to do it, and no reason to deal with the property as if they had done so. See also, *Craig* v. *Leslie*, 3 Wheaton, 563; 2 Spence Eq. Jur., 254 to 260.

If, therefore, the property was not re-converted into land before Nicoll assigned all his interest to Anderson & Oakley, his widow cannot have dower assigned to her out of his interest in it prior to the assignment, more than in any other personal estate

which he owned, and these considerations would seem sufficient to warrant the affirmance of the decree in the court below.

But there is another view of this case, which was fully argued by the counsel, when the case of *Nicoll* v. *Ogden et al.* was before the court, and we refer to their briefs, which are prefixed to the opinion of the court in that case, for all the law and arguments necessary on this point, and to the opinion of the court in that case, as found on pages 384-5-6, as decisive, in this court, at least, of the point, that by the instrument made in April, 1842, an executory, and not an executed trust was created in this property.

If the court shall be of the opinion that, by the April [*405] instruments, the parties intended to re-convert their personal property into land, which was its normal condition, then we submit, upon the authority of the case of *Nicoll* v. *Ogden et al.*, that the owners had not, under those instruments, any present vested legal or equitable estate of inheritance in the property.

They had rights in it, no doubt; but those rights were one or the other of these two, either to the proceeds of the sales which the trustees might make, or to restrain the power of sale which was vested in the trustees, make a partition of the unsold portion of their property, and then call upon the trustees to convey the property to the owners, in accordance with their partition.

Now, whether their rights in the property be called one thing or another, it is clear that they agreed to take their interest in it in money, until they should make a partition of it, and this is, in our opinion, the true construction of the papers made in April, 1842, considered in the light of the surrounding circumstances, under which they were made.

They vested the legal title to the company property in new trustees, with full power to sell it, and an imperative duty to divide the proceeds among the owners, until the latter should divide their property and call on the trustees to convey it to them in severalty.

The property should be regarded as personalty only, having none of the attributes of realty, until the owners had divided it among themselves as land, and called on the trustees for the conveyance of the legal title.

This view of the matter saves the case from all confusion or doubt as to the title, or kind of estate vested in the trustees, for the owners; for, in this light, they held it as personalty, until the owners had, by a partition and a demand of a conveyance, elected to take it as land.

But, whether the trustees held it as personalty for the owners, or held it in some other way, properly called an executory trust, or by some other name more or less open to criti- [*406]

cism, still the plain fact remains, that the owners had no absolute vested estate of inheritance in it, as in land, until they had divided it, and called on the trustees for a conveyance.

We submit the case upon the theory that no re-conversion of the property was intended or effected by the instruments made in April, 1842, and that it remained as personalty until long after Nicoll parted with his interest in it.

But, if the court shall be of opinion that an executory trust was created by those papers, then the opinion of this court in the case of *Nicoll* v. *Ogden et al.*, is decisive against the complainant's right to dower in her husband's share of the property.

We submit the following propositions as conclusively showing that the decree below should be affirmed:

1. It is agreed on all hands, that the property belonged to the owners as personalty and not as realty, until April, 1842.

2. That Bushnell's deposition shows that the papers made and dated April 1st, 12th and 25th, were delivered and took effect at one time.

3. That those papers are, therefore, to be regarded as one instrument, and read and construed together, and took effect upon the property and the interests of the owners from and after the date of their delivery, and if they did not operate as a re-conversion of the estate at that time, they never did. Authorities need not be cited to support this position.

4. That, under those instruments, as before, the property might all be sold by the trustees, and the proceeds divided in money among the owners, which excluded all incidents of realty from their respective interests.

5. That the owners had the right and the power under those instruments to divide their property, and stop the sale of it by the trustees, and when they had done so, and all concurred in calling on the trustees for a conveyance of their respective [*407] shares, it would be re-converted into realty, and not before, unless by some equally decisive act, in which all the owners joined.

6. That Nicoll parted with all his interest in the property before any partition was made, and while it was yet personalty, so that he had no estate in it, of the nature of realty; he had merely a right, in conjunction with the other owners, re-convert it, if he chose.

7. That, if the court shall be of opinion that all the April instruments taken together, vested in the trustees and the owners of the property, an estate, which was an executory trust, or called more properly by some other name, still, whether considered in the plain, practical view of the transaction, or by the light of the closest legal technicalities drawn from and supported by all the

cases bearing on the subject, it seems evident that neither Nicoll nor any of the other owners of the estate, had any interest in it *as realty*, until a partition was made, and conveyances were demanded of the trustees; until then, they had a right to do this, but as they might never do it, the court should not regard it as done.

8. In either view of the case, Nicoll, at the time of his assignment of his interest in the property to Anderson & Oakly, was not seized of such an estate of inheritance in the property, *as land*, that would descend to his heirs, and in which his widow is entitled to dower, and the decree below should be affirmed.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

It is agreed that the facts in this case are the same as those appearing in the case *Nicoll* v. *Ogden*, 29 Ill., 323, except so far as they may be rendered different by the deposition of Bushnell, which has been taken since that case was decided. After carefully reviewing the grounds of that decision, we see no reason to change the views there expressed. We will now proceed to an examination of Bushnell's evidence for the purpose [*408] of ascertaining whether it should lead us to a different result in this case. In that case we held that by the deed of April 1st, 1842, from Butler to Nicoll and Bushnell, to be held in trust for the beneficiaries, this real estate, and which had been previously regarded as personalty by the parties in interest, was changed from its artificial character of personal, to that of its ordinary condition of real estate, with all of its incidents. That by that conveyance Nicoll and Bushnell took the legal title in fee, simply as trustees, with no specific trusts declared, and that such a trust vested in the beneficiaries an equitable estate of inheritance for their several portions. That under this deed, the law implied the duty of the trustees to convey, on demand, to each *cestui que trust* his share, and that on a refusal a court of equity would have executed the trust by compelling a conveyance.

It was also held, that the beneficiaries were bound by that conveyance, and manifested their assent to it, as is shown by their deed of the 25th of April, which recites that the deed of the 1st of April was made by Butler to Nicoll and Bushnell at their request. It was also held that the *cestuis que trust*, by having that deed executed, manifested the intention to, and did thereby, change the entire fund into an equitable estate of inheritance in these lands. Nor could they by any subsequent declaration of trust, in any degree affect the rights of third persons, which may have attached after that conveyance was made, and before the specific trusts were declared. And under the law, married women became entitled to dower, in land of which the husband became

seized of such an estate during coverture, and could not be deprived of that right except in the mode prescribed by the statute. And that Mrs. Nicoll thereby became vested with the inchoate right to dower in the premises, and that her right was not barred by the declaration of trusts by the deeds of the 12th and 25th of April.

We also held that the deed of the trustees of the date of the 12th of April, specifying the trust upon which they held the [*409] property, neither enlarged nor limited their powers or duties. That they, after its execution, held the property precisely as they did under the deed of April 1st.

Bushnell, however, testifies that he was unwilling to accept the trust, and required the beneficiaries to make a declaration of such specific trusts as he was willing to undertake to execute. But he also says that the deed of the 1st and that of the 12th of April, were in his possession the greater portion of the time after they were executed until that of the 25th was made. This has very much the appearance of a delivery and acceptance of the deed. And we do not see how he could have had any objections to accept the trust under the deed of the 1st of April, as it could in no event impose any labor, expense or liability, except to convey when required to each of the beneficiaries. Under it, we can see no reason for the discussion in reference to the trust created by the deed of April 1st. Nor does he speak of any proposition ever having been made that Butler should make a further or different conveyance.

But when the question of sales came to be discussed, then we can readily see, that a person residing so far from the property of so large a value would be inclined to object to making sales in person. And when it is perfectly obvious that the care, attention and labor of the trust would be large, we can see that he would hesitate to undertake it in person. Hence the declaration of the trust of the 25th of April authorized them to perform the trust through attorneys in fact. And it is in reference to this deed that it would seem the discussion would most probably arise, and under which he would object to act, unless it contained some provision which would exonerate him from bestowing his personal attention to the execution of the trust.

He has failed to inform us why he and Nicoll executed the deed of the 12th of April, if they were unwilling to accept the simple trust created by the deed of the 1st. By it they assent to the trust, but are careful to assume no other [*410] or greater liabilities than the law imposes. This deed was an unequivocal acceptance of the trust if it was delivered.

He, however, says that he refused to act under the deeds of the 1st and 12th, until that of the 25th was executed. Now he says that he was applied to about the 1st of April, to become a joint grantee with Nicoll, for the lands described in the deed from Butler and wife, on the terms then proposed, which was a trust. He also says that he thinks the trust is more fully set out in other papers. This latter declaration, it will be observed, is only an opinion, and he does not say that those terms or conditions were then spoken of, or had been agreed upon. And as he says that it was a matter of discussion, the probabilities are that all that was then agreed upon was, that the property was to be conveyed to them, to hold upon such trusts as might be declared by subsequent agreement. The present opinion of a witness in reference to a matter which had transpired more than twenty years previously must necessarily be indefinite and very indistinct. It must require a memory such as but few men are endowed with, which can, after such a lapse of time, refer to conversations and agreements with any degree of precision. And when the entire character of a written instrument is to be changed, and apparent rights of importance are to be cut off, by oral evidence of so ancient a transaction, we should at least act with hesitation, however honest, truthful and respectable the witness. That Mr. Bushnell has given his evidence as he understands and remembers it, with candor and frankness we do not doubt, but we must suppose that his recollection is imperfect. He in his deposition says it is, when interrogated as to other particulars of the transaction.

He says that an effective delivery was not made of the deeds until the 25th of April. As to the deeds of the 12th and 25th, it is natural to suppose that such was the fact; but he says the deed from Butler to himself and Nicoll had been in their possession from the time it was executed. He says that he means by a delivery, an exchange of the papers after the minds of the parties have met—a consummation of the transaction. [*411] What papers would probably be exchanged? Clearly the deeds of the 12th and the 25th. The grantees already had possession of the deed of the 1st of April. And there is no intimation that it was delivered as an *escrow*, if such a delivery could be made to a grantee. Butler had executed it at the request of the *cestuis que trust*, and he must have intended it as a delivery when he placed it in the custody of the grantees, and the beneficiaries must have so regarded it when they had it executed.

We do not see that Nicoll, one of the grantees, ever objected to the trust imposed, or required any conditions before he entered upon the execution of the trust. And a failure of a co-trustee to act could not defeat the conveyance. In such a case, a court of

equity would have entertained jurisdiction for the purpose of preserving the trust. Bushnell's refusal could not have defeated the conveyance and have frustrated the intention of the *cestuis que trust.*

Again, if it had been the intention of the parties when the deed of the 1st of April was executed to preserve the character of the property as personalty, by continuing it as a trading fund, it is strange that we find no recital of the fact either in the deed of the 12th or 25th. On the contrary we find in both of those deeds a declaration that partition shall be made, if practicable, within six months from that date. We could scarcely expect to find a stronger expression indicating an intention by the beneficiaries to hold it as real and not as personal estate. That declaration would seem almost conclusive, that it was the intention of the parties not to convert the character of the property from real estate which it had acquired by the deed of the 1st of April, again into personalty. It was also provided that the partition should be made amicably by the *cestuis que trust* or by law. Now, previous to the deed of the 1st of April, neither of the *cestuis que trust* could, by a bill in chancery, have compelled a partition, because, by their previous agreement, these lands were held alone for sale, and all that could have been done was to obtain a decree requiring the execution of the trust by a [*412] sale of the lands. But under these deeds and declaration of trust the character of the property was entirely changed by the agreement of the parties, and either one of the *cestuis que trust* could, at any time after these instruments were made, have compelled a partition in equity.

The remainder of the real estate still belonged to them in equity, and upon their death it would have descended to their heirs, who could, in like manner, have compelled a partition.

The majority of the court are, for these reasons, of the opinion that the case of *Nicoll* v. *Ogden* is conclusive of this case, and that the decree of the court below must be reversed and the cause remanded.

Decree reversed.

MR. JUSTICE LAWRENCE dissenting:

At the time when Butler executed to Nicoll and Bushnell the trust deed of April 1st, 1842, it is admitted that the property in question was held as personalty. Butler could not change its character except with the consent of the *cestuis que trust.* The deed to Nicoll and Bushnell, as trustees, gave them the legal title, but did not reconvert the property into realty, unless that deed was made with the consent of the beneficial owners. In the instrument of April 25, 1842, they declare the trusts, and recite

that the deed was executed at their request. In the case of *Nicoll* v. *Ogden*, 29 Ill., 389, the court held that the deed created a naked trust, vesting the legal title in the grantees to hold simply for the use of the *cestuis que trust*, and subject to a demand by them at any time for a conveyance, and thus creating in them an equitable estate of inheritance subject to dower. It was further held that the recital of consent on their part to this conveyance, in the instrument of April 25, 1842, is to be considered as evidence of consent to the making of the deed in the precise form in which it was drawn, that is, to the creation of a naked trust by which the title was merely to be held for the benefit of the *cestuis que trust*, and with no other duty than to convey it in accordance with their directions. [*413] Since the hearing of that case, the deposition of the trustee, Bushnell, has been taken, and in my opinion it is shown by his evidence, viewed in connection with the character of the enterprise, from its inception, the reasons for the conveyance to Bushnell and Nicoll growing out of the pecuniary embarrassments of Butler, and the declaration of trusts embodied in the instruments of April 12th and 25th, that there was no intention on their part to change the character of the property, and that the recital of their consent to the deed is to be construed as a consent that Butler should convey the legal title to be held by the new trustees, subject to the trusts already existing, and to such as might be specified in connection with the change of title, and as a part of the same transaction. He testifies that the deed "first came under his observation about the 9th of April," and he, with his co-trustee, then executed the declaration of trust, bearing date the 12th of the same month. He does not say specifically whether this declaration was executed on the suggestion of the trustees or of the *cestuis que trust*, but he says it was all one transaction, and I can entertain no doubt that, as the deed left the trusts wholly undefined, the instrument of the 12th defining them was intended to be contemporaneous with the deed and, as between the parties and privies, is to be considered as a part of the deed. But the trustees, for their own protection, desired a still further specification of the trusts, and at their suggestion the *cestuis que trust* executed the instrument of the 25th of April, differing in no substantial particular, as to the character of the trusts, from the instrument of the 12th, but important to the trustees, because executed by the *cestuis que trust*, while the instrument of the 12th was executed only by the trustees. Bushnell swears that he refused to accept and act under the trust until this last instrument was executed, and that the three instruments were all one transaction.

I think, then, in brief, that the deed from Butler to Bushnell

and Nicoll could not change the character of the property [*414] from personalty back to realty without the consent of the beneficiaries; that their consent was given merely to the making of a deed, leaving the trusts undefined, with the exception that the existing trust should remain in force unless modified by instruments to be executed in connection with the deed, and as a part of it, that these instruments are to be regarded as a part of the deed, and that they leave the property stamped with the same character which it had before. The property having once acquired the character of personalty, it could only be re-converted into realty by acts on the part of the owners manifesting a clear intent to that end. Viewing these instruments in connection with the evidence of Bushnell, I can find in them no evidence of such intent taking immediate effect. The agreement that the property shall be divided, if practicable, within six months, I regard as an agreement that it *shall* be so converted into realty within that time by means of a partition, if practicable, but not as re-converting it, *eo instanti*. In my opinion, the decree of the court below should be affirmed.

FREDERICK SEVERIN
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

1. JURISDICTION OF A JUSTICE — *how affected by the form of the complaint.* A justice of the peace has jurisdiction in a prosecution for an assault and battery; and this jurisdiction will not be at all affected by the fact that the complaint, upon which the warrant for the arrest of the party accused was issued, charged him with an assault with a deadly weapon, because in that charge an assault and battery is included.

2. FORMER CONVICTION — *of the lesser offense which was included in the greater.* An assault with a deadly weapon may embrace an assault and battery, yet a conviction of the latter, growing out of the same transaction, cannot be pleaded in bar of a prosecution for the former.

[*415] WRIT OF ERROR to the County Court or De Kalb county the Hon. EDWARD L. MAYO, Judge, presiding.

The facts of this case are fully presented in the opinion of the court. The question arising upon the assignment of errors is, whether the jurisdiction of a justice of the peace over the offense of an assault and battery is affected by the fact that the complaint upon which the warrant for the arrest of the accused was issued, charged him with having committed an assault with a deadly weapon.

MR. R. L. DIVINE for the plaintiff in error:

The question which it is desired to have determined is one of jurisdiction.

The original complaint, on oath, made in writing before the justice, charges in the language of the statute, (Scates' Comp., p. 381, sec. 52,) an assault with a deadly weapon, an indictable offense, punishable by fine of not less than $25, nor more than $1,000, or by imprisonment in the county jail for a period not exceeding one year, or both. Laws of 1859, p. 153.

The justice had no jurisdiction to try and render final judgment in case of the offense charged. Const., article 13, sec. 10; *Ex parte Bollig*, 31 Ill., 95.

Assault and battery, which is defined as the "unlawful striking or beating of another," (3 Black. Com., 120,) is not charged.

The statute provides (Scates' Comp., p. 690,) that "in all cases of assault, assault and battery, and frays, any justice of the peace may, upon his own knowledge, or upon the oath of any competent person, issue his warrant to any constable of his county for the arrest of every person charged *with either of said offenses*," etc.

Under this statute, there are two modes, and no more, by which a justice of the peace may acquire jurisdiction of a case of assault and battery. *First*, When the offense is committed of his "own knowledge," or in his view. *Sec-* [*416] *ond*. Upon the oath of a competent person, charging that "said offense" has been committed.

There is no pretense in this case that the justice of the peace had personal knowledge of the commission of any offense whatever.

Justices of the peace, like all other courts of inferior jurisdiction, take nothing by implication, but are strictly confined to the powers given by statute. Their right to adjudicate and determine a cause must affirmatively appear. Sedgwick on Stat. and Const. Law, 347; *The People* v. *Koeber*, 7 Hill, (N. Y.,) 41; *Straughan* v. *Inge*, 5 Ind., 157; *Wakefield* v. *The State*, Ib., 195; *Commonwealth* v. *Messenger*, 4 Mass., 462; 2 Phil. Evid., 4 Am. ed., 137; *Wilson* v. *The State*, 16 Texas, 246; *Flack* v. *Harrington*, Breeze, new edition, 213; *Wells* v. *Mason et al.*, 4 Scam., 84.

In *Powers* v. *The People*, 4 Johns., 292, a conviction for petit larceny before a justice of the peace was reversed because it did not affirmatively appear that the property stolen was worth *less* than $12.50, and the case therefore within the jurisdiction of the magistrate.

This court has held in numerous cases, that if a warrant, attachment, capias or *ca sa* issue upon an insufficient or improper affidavit, the writ is void, and parties engaged in its execution, (with the exception, perhaps, of ministerial officers acting under process regular upon its face,) are trespassers. *Moore* v. *Watts et al.*, Breese, new ed., 42; *Hull* v. *Blaisdell*, 1 Scam., 334; *Gorton* v. *Fizzell*, 20 Ill., 295; *Exparte Smith*, 16 Ill., 347.

Neither assault, assault and battery, nor fray is charged in this complaint, but an entirely distinct offense, which the circuit court alone had jurisdiction to try. Nor, under the statute, is assault and battery included in the greater offense of assault with a deadly weapon. *Carpenter* v. *The People*, 4 Scam., 198. Exclusive original jurisdiction is given, of the one class of cases, to the circuit or other court of record, of the other to justices [*417] of the peace. In this case the justice was without *jurisdiction of the process* issued by him, and his acts are void. See 2 Phil. Evid., 4th Am. ed., 146–7, and cases there cited.

A written complaint having in this case been resorted to, although not perhaps absolutely required by the statute, must now determine the question of jurisdiction.

"It is laid down by several writers that it is the duty of the magistrate, independent of any statutory provision, to take all charges, of whatsoever kind or complexion they may be, in writing." * * * "When the complaint is required by statute to be in writing, that form must be observed; and this is usually directed when power is given to apprehend the offender in the first instance. But as before observed, unless it is so directed expressly, it is not necessary that complaint should be in writing. But if a complaint in writing is resorted to, *being the substratum of the magistrate's jurisdiction*, and in the nature of an indictment, it should contain a complete statement of the offense; for the evidence given upon the trial can only support the original charge but can by no means extend or supply what is wanting in the complaint." Archbold's Crim. Practice and Pleadings, 6th Am. ed., vol. 1, page 31, Am. note. See to same effect Barbour's Crim. Law, 2d ed., p. 519–20.

"The adjudication of the justices is in general confined within the limits of the information or complaint. The justices had no jurisdiction to convict summarily of an assault, when, as in the present case, it is clear the complainant did not call upon them to exercise that jurisdiction." Paley on Convictions, 4th ed., p. 55–6

In *Conway* v. *The State*, 4 Ind., 94, the defendant was indicted for suffering his *mare* to be run in a horse race, and offered to adduce in evidence at the trial a justice's docket showing that he had been complained of before the justice and fined by him for suffering his *horse* to be run in a horse race, and to prove by parol that it was a *mare* and not a *horse*, for the suffering of which to be run, he had been fined by the justice. *Held* that the [*418] evidence was properly rejected. The court say, "The description in an affidavit for the prosecution of such an offense, before a justice of the peace, of the kind of animal suffered to be run, is as binding on the prosecutor and as mate-

rial as is that in an indictment, and would necessarily have to be sustained by proof."

"It may be further observed, in addition to what has been already said as to the statement of the offense, that the complaint should contain an exact description or statement thereof, in order that the magistrate may be aware of its precise nature, and in order to show upon the face of it *that the magistrate has jurisdiction*, it should appear from such description or statement, that the offense *as charged* is within both the *letter* and *spirit* of the statute under which it is made. And this statement is also required as an act of justice towards the defendant, who has a right to know the exact nature of the charge he has to answer." Barbour's Crim. Law, 2d ed., p. 619–20.

In *Commonwealth* v. *Messenger*, 4 Mass., 462, the court say "the remedy pursued in this case" [a complaint for Sabbath breaking] "is a summary proceeding before a justice in which the court will see that the *fact charged is strictly within the statute* and that the proceedings are conformable to it."

In *Commonwealth* v. *Gray*, 5 Pick., 44, a conviction before a magistrate for a violation of one of the by-laws of Boston was reversed, because the complaint did not conclude with the formal words "contrary to the form of the statute."

The want of a proper and sufficient affidavit, in a case of the kind at bar, renders the whole proceeding a nullity, and the defect cannot be cured even by consent or agreement of parties. *Wilson* v. *The State*, 16 Texas, 246; *Bargis* v. *The State*, 4 Ind., 126.

In the last cited case, it was held under a statute authorizing justices of the peace to take cognizance of certain offenses "on complaint under oath or on view," that the magistrate was not authorized to convict upon the confession of the offender, and that his judgment under such circumstances was a nullity. The mode in which the magistrate under that statute took cognizance of the offense contemplated, was the same in [*419] which, under our statute, a justice of the peace may take cognizance of a case of assault and battery, and if even the confession of the guilty party is ineffectual to dispense with a complaint on oath of the commission of the offense which the magistrate was authorized to try, then a complaint of an offense clearly without and beyond the jurisdiction of a justice of the peace would be equally so. If not, then upon complaint of murder, burglary or any other felony or misdemeanor made to a magistrate, he would have the right to proceed to trial, and pronounce a final judgment.

The complaint made in this case would have authorized the justice as a court of inquiry, under section 203 of the Criminal

Code, to "inquire into the truth or probability of the charge exhibited" and to have committed, admitted to bail, or discharged, the defendant, but gave no authority to try him and pronounce final judgment, either for assault and battery or assault with a deadly weapon.

The recitals in the warrant issued in this case, and in the justice's transcripts, that complaint had been made on oath of assault and battery, etc., are unavailing as against the primary evidence on this point afforded by the complaint itself. Whether such complaint as would authorize the justice to hear and pronounce judgment in the case had been made or not, is a jurisdictional fact, and "no court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts on which jurisdiction depends." *The People* v. *Cassels*, 5 Hill, 169. In the case referred to it was held that a party committed for contempt of court, might show by parol proof that the recitals in the warrant of commitment were untrue in fact, and the process of commitment unauthorized. In *Pardon* v. *Dwire et al.*, 23 Ill., 574, this court held that a recital in a justice's transcript, that a summons had been "returned duly served by reading to the defendant" might be overcome by the evidence afforded by the return itself on the summons, which did not show proper service, and the judgment of the justice was for that reason [*420] held void. In *Durham* v. *Brown*, 24 Ill., 94, this court held, that the recital in the record that a power of attorney had been duly proved was not evidence of that fact. See on this point also *Welch* v. *Nash*, 8 East, 403, in which LAWRENCE, J., says: "The justices cannot give themselves jurisdiction in a particular case, by finding that as a fact, which is not the fact."

Moreover, the return of the justice of the peace, to the writ of *certiorari* shows that "*the complaint*" on which the warrant issued, and the one set out in the record, was transmitted by him to the county court, and that it is a complaint for an assault with a deadly weapon, and not for assault and battery.

It is especially true in respect to recitals of facts upon which jurisdiction depends, that they have no conclusive effect, but are open to contradiction by extrinsic proof. 2d Phil. Evid., 4th ed., 165 and note 1; *The People* v. *Cassels*, 5 Hill, 169.

This is the doctrine announced in this State, even in respect to courts not of inferior jurisdiction. *Goudy et al.* v. *Hall*, 30 Ill., 109.

That the recitals in question, viz: "that complaint had been made that assault and battery had been committed," etc., are not in fact true, is shown by the highest and most satisfactory evidence, the complaint itself.

The proceedings in this case are void for want of jurisdiction.

But it is not for jurisdictional defects alone that the court has power to reverse the judgment. Proceedings of this kind "are most broadly assailable on *certiorari* or other proceedings in the nature of a writ of error or appeal." "In such cases they are to show through the whole range of the suit or proceeding, a strict conformity to the powers of the court."

"These inferior jurisdictions not proceeding according to the course of common law are confined strictly to the authority given. They can take nothing by implication." 2d Phil. Evid., 4th Am. ed., 137.

For the reason then that in this case no offense is charged [*421] in the complaint over which the justice had jurisdiction, but on the other hand it *affirmatively appears* that one is charged, in precise and accurate language over which he has *no jurisdiction*, the warrant issued by him was unauthorized and the proceedings consequent thereon were not only irregular but *coram non judice*. The plaintiff in error prays a reversal of the judgment of the county court and that the proceeding may be quashed.

Mr. CHARLES BLANCHARD, State's attorney, for the people:

The complainant shows the commission of an assault and battery, certainly. *Adams* v. *Governor*, 22 Geo., 417. It was for that offense the warrant was issued. It matters not what is contained in the complaint, so that it is sufficient to advise the justice that an offense has been committed, of which he has jurisdiction. *Miller* v. *Brinckerhoff*, 4 Denio, 118; *Staples* v. *Fairchild*, 3 Comst., 41; *Skinner* v. *Kelley*, 18 N. Y. (4 Smith,) 355.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was a proceeding before a justice of the peace against the plaintiff in error, on the following complaint, on oath: "The complaint and information of Richard Long, of said county, made before Tyler K. Waite, Esq., one of the justices of the peace in and for said county, on the 2d day day of August, 1864, who being duly sworn, on his oath says, that on the 2d day of August, 1864, at DeKalb county aforesaid, Frederick Severin, with an abandoned heart and without provocation, did feloniously, with a deadly weapon, to wit, a large slab or stick of wood, make an assault on the said Richard Long, with intent, upon the person of said Long, to inflict a bodily injury, and did then and there strike said Long with said club, wounding him. Sworn to, etc.

On this complaint, a warrant issued for an assault and battery, on which the defendant was arrested, and being brought before Justice Waite, he obtained a change be- [*422] fore Justice Mayo. A jury was impaneled, and they rendered a verdict of guilty, and assessed the fine at eighteen dollars, on which the justice gave judgment.

These proceedings were brought to the county court by *certiorari*, where a motion to reverse the judgment of Justice Mayo was overruled, and a *procedendo* awarded to him to proceed on the judgment so rendered by him.

From this judgment, this writ of error is prosecuted, and the only question is, as to the jurisdiction of the justice on the complaint made to him.

It is insisted by the plaintiff in error the justice had no jurisdiction, for the reason that under section 52 of the Criminal Code, Scates's Comp., 381, the crime charged was an indictable offense, and not cognizable by a justice of the peace. He has argued this point with great force and ability, but he seems to have placed out of his view the fact, that the warrant issued by the justice of the peace was a warrant in a case of assault and battery only, of which the justice had unquestionable jurisdiction. It is immaterial in what terms the prosecutor thought proper to state his complaint. If in the complaint an assault and battery was included, as it clearly was, of that the justice had jurisdiction, and issued his warrant in conformity therewith. If an indictable offense has really been committed, we apprehend this conviction for a simple assault and battery cannot be pleaded in bar of a prosecution for such offense.

In the case of *Freeland* v. *The People*, 16 Ill., 380, this court held that it was no bar to a prosecution for a riot, that one of the accused had been tried and convicted, and fined for an assault and battery arising out of the same transaction or offense and occurring at the same time. A riot may embrace an assault and battery, yet a conviction of the latter cannot be pleaded in bar of a prosecution for the former. So here this conviction [*423] of an assault and battery will be no bar to a prosecution for an assault with a deadly weapon under the fifty-second section of the Criminal Code.

There being no error in the record, the judgment is affirmed.

Judgment affirmed.

ERASTUS H. WHITNEY *et al.*

v.

JOSEPH ULLMAN.

FEES OF CLERKS, *for keeping indices to their court records — construction of act of 16th February*, 1865. Under the act of 16th of February, 1865, requiring the clerks of the Circuit Courts, and County Courts having common law jurisdiction, to keep indices to their court records, an "entry" consists of all the various items which are required to be placed in each index, the plaintiffs and defendants, in any one case, thus making two "entries," only, in each case — one in the plaintiff's index, and one in the defendant's. And for each of those "entries" the clerks may charge a fee of ten cents, or twenty cents for the two "entries" in each case, and no more.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

The facts of this case appear in the opinion of the court.

Messrs. WALKER, SLEEPER & HART, and Mr. JOHN A. JAMESON for the plaintiffs in error.

Mr. C. BECKWITH for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the court:

On the 16th of February, 1865, the General Assembly of this State passed an act entitled "An act requiring the clerks of the Circuit Courts, and County Courts having common law jurisdiction, of the several counties in this State, to keep indexes to their court records."

The first section of this act provides, "That it shall be the [*424] duty of the clerks of the Circuit Courts (and County Courts having common law jurisdiction,) of the several counties in this State, to provide two well bound books, to be denominated 'plaintiffs' index to court records,' and 'defendants' index to court records,' to be ruled and printed substantially in the following manner:

Plaintiffs.	Defendants.	Kind of Action.	Term Commenced.	Record Book.	Pages.

Term Disposed of.	Date of Judgment.	Judgment Docket.		Execution Docket fi. fa.		Execution Docket alias.		Execution Docket pluries.	
		Book.	Page.	Book.	Page.	Book.	Page.	Book.	Page.

Fee Book.		Certificate of Levy.		Certificate of Sale.		Certificate of Redemption.		Satisfied or not satisfied.	No. of Case.
Book.	Page.	Book.	Page.	Book.	Page.	Book.	Page.		

"In which said books, all the cases which shall have been determined in said court within seven years next preceding the passage of said act, and all cases now pending, and which shall hereafter be commenced, shall be entered. Said books shall set forth the names of the parties, kind of action, term commenced, record books and pages on which said cases are recorded, the term disposed of, date of judgment, books and pages of the judg-
[*425] ment dockets, execution dockets, fee books, certificates of levy, sale and redemption, records on which they are entered, satisfied or not satisfied, and No. of case. The defendants' index shall be ruled and printed in the same manner as the plaintiffs', except the parties shall be reversed. And the clerks shall receive a fee of ten cents (10 cts.) for such entry, as provided for in this act, to be paid by the parties in the suit, except for the cases now disposed of, which shall be paid by the Board of Supervisors or County Courts of the several counties in this State; and they are hereby authorized and required to make appropriations for that purpose." Session Laws, 1865, page 79.

The record before us shows that the plaintiffs in error presented to the Circuit Court of Cook county copies of certain cost bills taxed by the clerk of that court against them in a certain cause in which the defendant in error was plaintiff, and they, the plaintiffs in error, were the defendants. The bills showed the costs made by the plaintiff and by the defendants respectively in the cause. On these bills, the plaintiffs in error have marked certain items as objected to, and therefore entered their motion to have the costs retaxed by the court, which motion the court denied. A bill of exceptions was taken to this ruling of the court, and the case brought here by writ of error.

The evidence shows that separate bills of costs were made out in the cause of Erastus H. Whitney *et al.* against Joseph Ullman, in which judgment had been rendered against the plaintiffs for the costs.

In the plaintiffs' bill of costs were the following items taxed against them, to which they objected:

1. Entering No. and title of case, kind of action and term when commenced, in plaintiffs' index, - - - - - 10c.
2. Entering book and page of record of judgment, term when disposed of, and date of judgment in same, - - - 10c.
3. Entering book and page of judgment docket, - 10c.
[*426] 4. Entering book and page of fee books, - - - - 10c.
5. Entering book and page of execution docket, - 10c.
6. Entering satisfaction, - - - - - - - - - - - 10c.

In the defendant's bill of costs, the same items were charged, as entered in defendant's index, and objected to.

The question is, as to the legality of these several charges, under the act of assembly quoted.

It is said by the defendant in error, that in making the entries relating to cases disposed of, each of the items referred to is copied from a separate book kept by the clerk, as required by law, and is in itself a complete and entire entry. That in the progress of a cause, these entries are made at different times, and in the order of the particular steps requiring them, and each of them is a separate and independent entry of a proceeding in court, and as much so as if it were actually transcribed from a separate book; although the entries in cases pending might be made in all of the different books in the clerk's office at the same time. He then argues, as the entry must be made at the time of the proceeding which it describes, and is, in itself, a complete entry of that proceeding, the proper construction of the law is, that the expression "such entry" means an entry only of such facts as pertain to the proceeding described; and it is not to be supposed the clerk is bound to make *six* entries, each of them separate and distinct, made at different times and of distinct matters, for the fee of ten cents. And he further argues, if it had been intended that but one fee of ten cents should be charged in each case, or ten cents to the plaintiffs, and ten cents to the defendants, the law could have so provided, in express terms, as the laws regulating fees and salaries do in other cases.

The plaintiffs in error contend that the act means nothing more than this: that each case shall be entered twice, once in the plaintiffs' index, and once in the defendants' index, and for such entry in each book a fee of ten cents is chargeable. These entries would, necessarily, be made up, each of them, of several [*427] different items, scattered through the different books the clerk is required to keep, but when collected by him and transferred into these new books, and entered therein, they constitute but one entry in each of those books, for which a fee of ten cents is allowed.

This seems to us the proper construction of the act, and it is strengthened by that clause of the act fixing the compensation of the clerks. That clause declares the clerks shall receive a fee of ten cents for such entry, as provided for in this act, to be paid by the parties in the suit, except for the cases now disposed of, which shall be paid by the Board of Supervisors or County Courts of the several counties, who are required to make appropriations for such purpose. Each entry to be made in these books, if each is composed of six or more items, can be made by a competent clerk in a very few minutes, and the fee of ten cents for each, or twenty cents for both entries, is ample compensation, as can be readily seen, by computing how many of these entries can be

made in the business hours of a day, besides attending to the clerk's current business of the day at his office.

The claim set up here, to charge for each item composing an entry, may have originated in the interpolation of the word "each" as the word to be substituted for "such" in the printed act. By what authority this was done, we do not know. Taking the law as it stands, without reading the word "each," as intended for "such," we think it is clear, but one entry was contemplated to be made in each book, and a corresponding charge made therefor of ten cents for each entry, no matter of how many items it may be composed, in each book. The law means simply, that the proceedings in each case shall be entered in each of these books. When entered, they become but one entry, when arranged under the proper heads according to the form prescribed. The law contemplates the entry of each case with the steps taken in it, nothing more.

[*428] The court erred, therefore, in disallowing the objections and in refusing to retax the costs, by ordering the objectionable items to be stricken out, and for this error the judgment must be reversed, with instructions to the Circuit Court to allow not more than twenty cents for the entry of the case and the steps in it, in the books required by the act, being ten cents for each entry.

Judgment reversed.

ROBERT MILLER, Administrator,
v.
BENJAMIN F. MCCRAY.

1. JURISDICTION—*of justices of the peace.* Justices of the peace have jurisdiction, under the tenth clause of the seventeenth section of the act in regard to justices of the peace, in suits brought by administrators against a person not an executor or administrator, where the amount claimed does not exceed one hundred dollars.

2. FORMER DECISION. Nor is the case of *Williams* v. *Blankenship*, 12 Ill., 122, to be understood as deciding otherwise. The court there held that in a suit by an administrator and *against an executor*, the justice had not jurisdiction if the amount claimed exceeded twenty dollars. But they did not decide that executors and administrators could not bring suit to the amount of one hundred dollars, as the tenth clause of the section says they may, in all cases where another administrator or executor is not defendant.

WRIT OF ERROR to the County Court of Livingston county; the Hon. JONATHAN DUFF, Judge, presiding.

This suit was originally instituted before a justice of the peace in Livingston county, by Robert Miller, administrator of the estate of William S. Malone, deceased, against Benjamin F. McCray, to recover a sum "not exceeding one hundred dollars."

The cause was removed into the County Court by appeal, [*429] where the defendant appeared and entered his motion to dismiss the suit upon the ground that the justice of the peace who rendered the judgment from which the appeal was taken, had no jurisdiction in the case, because the plaintiff sued as an administrator, and the amount claimed exceeded twenty dollars. The court sustained the motion and dismissed the suit. The plaintiff thereupon sued out this writ of error, and now insists that the ruling of the County Court in sustaining the motion was erroneous.

Mr. A. E. HARDING and Mr. L. E. PAYSON for the plaintiff in error.

Mr. J. M. BARRET for the defendant in error.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

The only question presented by this record is, whether justices of the peace have jurisdiction in suits brought by administrators against a person not an executor or administrator, where the amount claimed does not exceed one hundred dollars. The 10th clause of the 17th section of the act in regard to justices of the peace gives jurisdiction "in all actions in which an executor or administrator is plaintiff, or for property purchased at an executors or administrators' sale, where the amount claimed does not exceed one hundred dollars." We do not see how, under this clause, the jurisdiction can be questioned. Language could hardly be more explicit. The case of *Williams* v. *Blankenship*, 12 Ill., 122, quoted by the counsel for the defendant in error, seems to be misunderstood. That was a suit, not only by an administrator, but against an executor, and the court held that the 11th clause in the section above quoted, giving jurisdiction in actions *against* executors and administrators to the amount of twenty dollars, must be considered as restrictive of the other provisions. But they did not decide that executors and administrators could not bring suit to the amount of $100, [*430] as the 10th clause of the section says they may, in all cases where another administrator or executor is not defendant. It may be remarked that the decision in the case of *Williams* v. *Blankenship* is very incorrectly stated by the reporter in his syllabus, and hence, unless the opinion is examined with a little care, persons may be misled as to what really was decided.

Judgment reversed.

Syllabus—Statement of the Case.

ANTONIA SIEGWALD
v.
ANTON SIEGWALD.

1. WILLS—*construction thereof—effect of words of limitation upon a prior devise in fee.* A will contained this clause: "I give and bequeath to my beloved wife, Antonia, all my real and personal estate, wherever situated, in fee simple absolute forever, that is to say,—that my said wife shall have all of the benefits thereof, until the expiration of her life, at which time my son, Anton, shall be the only heir of real or personal estate, what may be left." *Held*, that the wife took only an estate for life in the real estate, and remainder in fee to the son.

2. This is not like a case of a devise in fee, with a power of sale, and a subsequent limitation over; but in this case, the testator not only makes an executory devise of the estate at the death of his wife, to his son, but he expressly limits the enjoyment of the property to her benefit until the termination of her life. She is given no power of sale of the real estate.

3. IN A DEED THE RULE WOULD BE DIFFERENT. Had this been a deed there can be no question that the limitation would have been void, as repugnant to the fee previously granted.

4. LIMITATION OVER, BY DEED OR WILL. It is a plain and primary rule that a fee cannot be limited upon a fee, by deed, but may by an executory devise.

WRIT OF ERROR to the Recorder's Court of the city of Chicago; the Hon. EVERT VAN BUREN, Recorder, presiding.

[*431] On the 13th day of October, 1862, David Seigwald died seized in fee simple of certain real estate, of the alleged value of about thirteen thousand dollars. Prior to his death, the said David had made and published his last will and testament, as follows:

Know all men by these presents, that I, David Siegwald, of the city of Chicago, county of Cook, and State of Illinois, being of sound mind and memory, do hereby make, publish and declare this my last will and testament, in manner following:

1st, I give and bequeath unto my beloved wife, Antonia, all my real and personal estate wheresoever situated in fee simple and absolute forever, that is to say, that my said wife shall have all the benefits thereof, until the expiration of her life, at which time my son, Anton, shall be the only heir of real and personal estate, what may be left.

2d, I do hereby appoint my said wife executrix of this my last will and testament, and also guardian of my child, Anton, until he becomes of age.

In witness whereof, I have hereunto set my hand and seal, this 30th day of September, in the year of our Lord one thousand eight hundred and sixty-two.

The will was duly proven and admitted to record, and on the 15th of November, 1862, letters testamentary were issued to the executrix named therein.

The devisee, Antonia Seigwald, widow of the testator, being about to sell and convey the real estate for the purpose of paying off an incumbrance upon the same, which was created in the life time of the testator, and claiming to own such real estate in fee simple absolute by virtue of the terms of the will, Anton Siegwald, son of the testator, who was still a minor, exhibited his bill in chancery in the court below, by his next friend, setting forth the foregoing state of things, and insisting that the said Antonia, by the terms of the will, acquired only a usufructary interest in the said real estate, during the term of her [*432] natural life, and that the fee simple title thereto was, by the terms of the will, vested in him, the complainant, subject only to the life estate of said Antonia.

He prayed that the will might be so construed, and the said Antonia enjoined and restained from selling or disposing of the said real estate.

The defendant demurred to the bill, and in showing cause of demurrer, contended for a different construction of the will,—that by its terms the fee simple title to the real estate became vested in her.

The court overruled the demurrer, and the defendant electing to abide by the same, an injunction was ordered in accordance with the prayer of the bill, and the defendant was decreed to pay the costs. She thereupon sued out this writ of error, and now questions that ruling of the court.

Mr. EDMUND JUSSEN for the plaintiff in error:

The question, whether or not the Recorder's Court of the city of Chicago, erred in overruling the demurrer filed to the bill of complaint in this cause depends solely upon the construction of the will set out in the said bill.

The only point of controversy is, whether the will in question gives to the plaintiff in error a fee simple in the real estate mentioned in the bill of complaint, or only a life estate.

The controlling clause in the will reads as follows:—"I give and bequeath unto my beloved wife, Antonia Siegwald, all my real and personal estate, wheresover situated, in fee simple, absolute forever, that is to say, that my said wife shall have all the benefits thereof until the expiration of her life, at which time my son, Anton, shall be the only heir of real or personal estate, what may be left."

There can be no doubt that this will devises to the plaintiff in error an estate in fee simple, and that the last part of the above clause, which contains a devise over to the son, Anton, is inoperative and void, because it is repugnant to the [*433]

first part of said clause, which in clear and distinct terms gives an estate in fee simple.

In *Jackson* v. *De Lancy*, 13 Johns., 552, the court held that the devise to Lady Sterling was of "all the real and personal estate whatsoever," that the word estate here carried a fee, and that the further provision in the will, that, if she died, without giving, devising, selling or assigning it, etc.," the estate should go to his daughter, Catharine Duer, was not a good limitation by way of executory devise, as such a limitation was repugnant to the power to sell, and consequently void.

The same doctrine was laid down in *Jackson* v. *Bull*, 10 Johns., 19, and *Ide* v. *Ide*, 5 Mass. (Tyng,) 504.

It cannot be successfully argued that the last part of the clause in question, commencing with the words, "that is to say" qualifies and explains the first part of said clause to such an extent as only to give the plaintiff in error a life estate in spite of the express terms devising a fee simple.

The intention of the testator was doubtless to give to his wife the power to dispose of the personal and real estate during her life. This intention he expresses when he says, "that she shall have *all the benefit* thereof during her life," and this intention becomes more clear and explicit, when he provides that at the expiration of the life of his wife, his son, Anton, should be the only heir of the real or personal estate, *which might be left.* If the testator's intention had been to devise only a life estate to his wife, she of course would take only a usufructuary interest, and *all* the real and personal estate *would be left* at the time of her death.

In the case of *Ide* v. *Ide*, 5 Mass. (Tyng,) 504 and 506, the court held, "That the limitation over was not of the estate devised to P., but of *what estate devised to him he should leave.* That from this expression it seemed very clear, that the testator, after having devised an express fee simple to P., intended also, [*434] that he should have an unqualified power to dispose of it at pleasure, and if he should dispose of the whole there would be nothing left subject to the executory limitation, and that the limitation over was void. PARSONS, *Ch. J.*

The same doctrine is held in the case of *Attorney General* v. *Hall*, Fitzg., 314.

Such construction is to be given to the words of a will, as to effectuate such estate, as comports with the intention of the testator, provided such construction is consistent with the rules of law, and in all cases upon this subject, where the proper technical terms have not been used, the question is, What is the intention of the testator? Reeve on Domestic Relations, 487.

If the will devises a fee simple to the plaintiff in error, the

court erred in overruling the demurrer and in ordering that an injunction issue, and in rendering judgment for costs against the plaintiff in error, as all the rights which the defendant in error claims are based upon the supposition that the will gives only a life estate to the plaintiff in error.

MR. JAMES H. KNOWLTON for the defendant in error.

MR. CHIEF JUSTICE WALKER delivered the opinion of the court:

The bill in this case was filed for the purpose of restraining plaintiff in error from selling certain real estate described in the bill. The whole controversy arises on the construction of the last will of David Siegwald, from whom both parties claim title. The clause of the will under which the question in dispute arises, is this: "I give and bequeath to my beloved wife, Antonia, all my real and personal estate wheresoever situated, in fee simple absolute forever, that is to say, that my said wife shall have all of the benefits thereof, until the expiration of her life, at which time my son, Anton, shall be the only heir of real or personal estate, what may be left." He then appoints his wife executrix of the will. The bill alleges that the will was proved and [*435] duly admitted to record in the proper office and that letters testamentary were duly granted by the probate court.

It is also alleged in the bill that plaintiff in error was about to sell the real estate and to convey the same in fee simple absolute. That the property proposed to be sold was worth near thirteen thousand dollars, and was incumbered by the testator in his life time to the amount of about three thousand dollars, which still continued on the premises, and that one of the objects of the sale was to pay the incumbrance. Complainant insists that by the terms of the will, defendant has only a life estate in the premises, and that the fee simple estate is vested in him, subject only to her life estate. The bill prays an injunction to restrain the sale of the premises. To this bill a demurrer was filed, and on the hearing it was overruled and an injunction decreed restraining plaintiff in error from selling the property; to reverse which, this writ of error is prosecuted.

Had the devise contained no language designed to operate as a limitation, the will would have been free from all difficulty. The first clause unaffected by the words of limitation, unquestionably vested a fee simple absolute, and plaintiff in error insists that they are repugnant to the devise, and are, therefore, inoperative, and leaves an estate in fee in the devisee, and not a life estate. Wills, like all other instruments, must be so construed as to effectuate the intention of the testator, and that intention must be ascertained from the language employed in the instrument itself. And in arriving at the intention, all of the language em-

ployed must be considered. It seems to be evident that the testator did not intend to devise his widow a fee simple absolute, otherwise he would not have added the limiting clause. Had that been the intention, he had fully accomplished the purpose without employing the latter clause; but when he did so, it must have been to limit or qualify the estate already devised.

By the limiting clause, the testator declares that she shall only have the benefit of the estate until her death. This [*436] would seem to manifest the intention only to devise a life estate, as all would have admitted had he not in the previous clause declared that she should take "in fee simple absolute forever." It may be that he designed to devise to her a contingent fee depending upon the survivorship of herself and the son. That in the event of the death of the son, she surviving him, she should have the fee, but in case of her death before that of the son, he should take the fee; and until that was determined, that she should use and enjoy the benefit of all the property. And it is altogether probable, that this language that the son should be the heir to what might be left at her death, had the devise not embraced goods and chattels, would have been different. Had it related to land alone, different language would probably have been employed.

We are, however, of the opinion that the design was to give the widow simply a life estate in the property, in remainder over to the son. But the personal property being perishable in its nature, and generally of that character that it must be used or consumed to be enjoyed, he only provided that the son should take such portion as remained at her death. Hence the language employed in the will. We think that this is the most reasonable construction that can be applied to the whole clause when considered together. To adopt the construction contended for by the plaintiff in error, we must reject the whole of the qualifying words of the devise, and this we are not at liberty to do unless when considered, the provision is repugnant to the law, and contravenes its rules or policy. Then does this devise, limited as a life estate to the widow, in remainder to the son, contravene any rule of law, as it clearly does not its policy? We are referred by plaintiff in error to the case of *Jackson* v. *DeLancy*, 13 Johns., 537, as an authority which supports the position that she took a fee simple estate notwithstanding the limitation over. The court there said there was no disability on the part of Lady Sterling as she owned the whole estate in fee. The devise to her, [*437] was of "all the real and personal estate whatsoever, etc.," and the court say that the word *estate* carried a fee, and the further provision in the will, that if she died "without giving, devising, selling or assigning it, etc.," the estate should go to his

daughter, Catharine Duer, was not a good limitation by way of executory devise, as such a limitation was repugnant to the power to sell, and, consequently void. The case of *Jackson* v. *Bull*, 10 Johns., 19, is referred to in support of the opinion of the court which announces the same rule.

It will be observed, that in these cases, an express power to sell is given, or language employed from which the law implies the power. In the first case referred to, the limitation is upon the condition that the first taker should not give, devise, sell or assign the property during her life. In the latter the property was devised to the son, his heirs and assigns. The case of *Ide* v. *Ide*, 5 Mass., 500, was a devise to a son of the testator in fee, with devise over, in case the devisee should die without issue. The court there held that the limitation was repugnant to the devise, and that an absolute estate vested in the first devisee, which was not divested by his dying without issue; considerable stress is placed upon the fact that the devise over, was of whatever estate he might have at his death without lawful heirs from which the court inferred, that it was the intention of the testator to give full power to dispose of the property, which he did in his life time.

In the case at bar, however, the testator not only makes an executory devise of the estate at the death of his wife, to his son, but he expressly limits the enjoyment of the property to her benefit until the termination of her life. Had this been a deed, there can be no question that the limitation would have been void as repugnant to the fee previously granted. But the entire clause is contained in one sentence, and he nowhere, in terms, gives power to sell the property. It is true that he gives to his son, after the death of his wife, what may be left of the real and personal property. But he no doubt knew that the personal property would not remain until the period arrived [*438] when the limitation over should take effect.

Again, it is a plain and primary rule that a fee cannot be limited upon a fee, by deed, but may by an executory devise. And when it appears that such was the testator's intention it is the duty of the courts to give it operation. And that such was the testator's intention in this case, we are no doubt fully warranted in holding, as it does appear that he only intended to devise to his wife a life estate, or the use of the property until her death, and then in fee to the son.

The decree of the court below is therefore affirmed.

Decree affirmed.

EDWARD W. AUSTIN
v.
ALEXANDER H. UNDERWOOD.

1. HOMESTEAD EXEMPTION—*what constitutes purchase money.* Where a party, owning and residing upon a homestead, purchases and obtains a conveyance of land adjoining thereto, to be used as a part of the same, and procures the purchase money of the land thus added to the homestead to be paid by a third person, as a loan to the purchaser, the money thus paid by the lender will be regarded as purchase money of the land thereby acquired, as against the homestead claim of the purchaser for whom it was paid.

2. Such a case is distinguishable from one where money is borrowed to pay a pre-existing debt which was created in the purchase of the homestead.

3. It is the common understanding of the term purchase money, that it means money paid for the land, or the debt created by the purchase.

4. SAME—*effect of uniting in the security for the purchase money, a debt of a different character.* Although other indebtedness, as well as purchase money, may be secured by a deed of trust upon a homestead, in which there is no release of the homestead right, yet if the mortgagor omits to pay or offer to pay that portion which is purchase money, and a sale is had under the deed of trust in default thereof, the title will pass to the purchaser, and he may recover the premises in ejectment.

5. CHANGE OF THE FORM OF SECURITY—*its effect.* A change in the form of the security given for the purchase money, as from a mortgage to a deed of trust, will not change the character of the debt; the consideration of the mortgage being purchase money, it would so continue under the deed of trust.

[*439] APPEAL from the Court of Common Pleas of the city of Elgin; Hon. RICHARD G. MONTONY, Judge, presiding.

This was an action of ejectment instituted in the court below by Edward W. Austin against Alexander H. Underwood. The trial resulted in a verdict and judgment in favor of Underwood, the defendant. The plaintiff, Austin, brings the case to this court by appeal. The principal facts appear in the opinion.

M. SYLVANUS WILCOX for the appellant,

Messrs. PLATO & SMITH for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was an action of ejectment in the Common Pleas of the city of Elgin in the county of Kane, brought by appellant against appellee, for the Northeast fraction of the Southwest quarter of section 29, Township 42 North, in range 8 East, containing 55½ acres, a timber lot adjoining containing four (4) acres, and another piece, adjoining on which the defendant's house and buildings were situated in which he lived, containing twenty-one (21) acres. Trial by jury and verdict and judgment for the defendant, and an appeal to this court.

The appellant claimed title to the premises by purchase, under a trust deed executed April 4th, 1858, by appellee and wife, to J.

C. Austin, to secure five promissory notes executed to E. W. Austin, of even date with the trust deed. Default having been made, the trustee, J. C. Austin, after due notice, sold the land to E. W. Austin, in three separate parcels. The piece containing 55½ acres, for the sum of five hundred and twenty-six 9-100 dollars; the four acre tract for forty-five 60-100 dollars, and the tract containing twenty-one acres, for five hundred and sixty-eight 22-100 dollars, in all, amounting to eleven hundred and eighty-nine 91-100 dollars. The proceedings under the trust deed are all regular, but there was no release of the homestead right by appellee to the trust deed. It was proved, appellee had a [*440] small house and barn on the twenty-one acre tract, and lived on it August 11, 1858, had lived there with his family six or eight years; in 1854 or 1855, appellee purchased the 55 acre tract, and the four acre tract of Dibb, and since that time has occupied the whole farm; all the three pieces of land adjoining one another, and worth ten or twelve dollars per acre; appellee had worked the Dibb tract, but no one had lived on it, since Dibb sold to appellee and left.

The appellant then read in evidence, a certified copy of a mortgage deed, dated March 31st, 1855, executed by appellee and wife to the appellant, reciting, that he was indebted to appellant in the sum of $987.40 by his five notes of even date, one of them due one year after date, and four payable yearly thereafter, at ten per cent. payable annually, and to secure the payment of these notes appellee granted, bargained and sold to appellant the 55 and 21 acre pieces of land. In this mortgage there was no power of sale or release of the homestead. It was duly acknowledged and recorded.

On the 11th of August, 1858, appellant released this mortgage to appellee, which release was acknowledged August 11th, and recorded September 3d, 1858.

The appellant also proved by Thomas Dibb and Mary Dibb, that she being the owner of about sixty acres of land in the town of Dundee in Kane county, which, it is not denied, is the 55½ and 4 acre pieces, conveyed the same to appellee, by deed, executed in March, 1855; that appellant paid the whole consideration, being about nine hundred dollars, in gold; when the land was sold to appellee, he said appellant would furnish the money, and appellee would secure him by a mortgage on the land; appellee never paid the Dibbs anything for the land; he never had the money in his hand, and had nothing to do with paying the money; the entire consideration money was paid by appellant.

One Hewet testified, that he bought land of appellee in 1857, for which he paid four hundred dollars, a part of which being

three hundred and thirty dollars, he paid to appellant; at
[*441] that time appellant said appellee owed him between three and four hundred dollars, but don't know whether he meant to say that was all appellee owed him, or all that was then due him; from 1855 to 1857, appellee had no means except what he raised on the farm, and that was not more than enough to support his family.

The question arising on these facts is, was this money, thus paid by appellant, purchase money? if it was, a homestead right cannot, under the statute, be set up against the recovery.

We said in the case or *Eyster* v. *Hathaway*, decided at April term, 1864, that money borrowed of a third person, and paid out by a purchaser of land, cannot be regarded as purchase money. It is the common understanding of the term purchase money, that it means money paid for the land or the debt created by the purchase.

In that case, the money was borrowed to pay a pre-existing debt; in this case the land was purchased with the money of appellant and actually paid over by him for the land, not one dollar of it passing through the hands of appellee, and the entire consideration of the indebtedness was the deed to appellant.

This case is, therefore, clearly distinguishable from that, for here the entire consideration for the 55½ acres, passed directly from the appellant to Dibbs, and the deed executed to appellee, on the understanding, he was to give appellant a mortgage on all his land, to secure the payment. This, it appears he did do, which appellant, about the time of the execution of the deed of trust, released, taking his security under the deed, instead of under the mortgage.

Taking the trust deed, was but a change of security. The consideration of the mortgage, was purchase money, and it so continued under deed of trust. *Curtis* v. *Root*, 20 Ill., 53.

Although other indebtedness, of which there is no proof, may have been secured by the trust deed, over and above the purchase money for the Dibbs farm of 59 acres, or the money secured
[*442] thereby partially paid, still, appellee should have tendered the amount due on the purchase money advanced for the 59 acres; not having done so, the title passed to appellant, by the sale under the trust deed to this 59 acres, and the appellant was entitled to recover them in his action of ejectment.

The judgment of the court below is reversed and the cause remanded for other proceedings not inconsistent with this opinion.

Judgment reversed.

Syllabus—Statement of the Case.

HENRY L. SWARTWOUT
v.
JOSEPH EVANS.

1. AGENCY—*ratification by the principal.* A party assuming to act as the agent of his father who was the owner of a mowing and reaping machine, sold a half interest in the machine. For two years thereafter the purchaser and the original sole owner continued to use the machine as joint owners, the former paying one-half of the repairs, and his rights as the owner of one-half being constantly asserted, and as far as appeared, never denied until about the close of that period. *Held*, that under these circumstances, independently of the agents authority. his act must be considered as having been ratified.

2. JOINT OWNERSHIP OF PERSONALTY. Where there are two joint owners of personal property, one is entitled to the same possession and enjoyment of it as the other, and neither can be made liable for its conversion except by proof that he assumed and exercised *exclusive* ownership, repudiating the rights of the other.

3. DEMAND—*by one joint owner of another.* Where one of two joint owners of personal property demands of the other, not the joint use and possession, as joint owner, but the property as sole owner, the latter is at entire liberty to disregard such a demand.

4. To make a demand available under such circumstances, the party making it should demand the equal enjoyment of the property as joint owner.

5. SAME—*should be made before suit.* Where it is sought on the trial of an action of trover, to establish a demand by the plaintiff of the property in question from the defendant, to make the demand availing it must appear to have been made before the commencement of the suit.

6. VERDICT—*presumption as to its extent.* One of two joint owners [*443] of a mowing and reaping machine, sued the other in trover, claiming the entire machine to be his. The plaintiff obtained a verdict, but from the conflicting evidence as to the value of the machine, it could not be said whether the jury considered themselves as finding the value of the whole or only one-half. From the mode, however, in which the plaintiff submitted his case, claiming the whole machine, it was held proper to presume that the verdict was for the entire machine.

7. COSTS—*on re-hearing in the Supreme Court.* The only additional costs proper to be taxed upon the re-hearing of a cause in the Supreme Court, are the costs of the orders made necessary thereby, and costs of filing any papers incident to the re-hearing.

APPEAL from the Superior Court of Chicago.

This suit was originally brought by Joseph Evans against Henry L. Swartwout, before a justice of the peace in Cook county, and was removed into the Superior Court of Chicago by appeal.

The action was trover, and was instituted for the recovery of damages for the alleged conversion by the defendant of a mowing and reaping machine, claimed to belong to the plaintiff.

It appears from the testimony as developed on the trial in the Superior Court, that in the year 1839, the plaintiff purchased the machine from one Jones, for $75. About the 1st of July, 1850, Richard Evans, a son of the plaintiff, sold one-half of the machine to Swartwout, the defendant, for twenty-five dollars.

Richard, at the time, in conjunction with his brother Joseph,

was managing the farm of his father, and attending to his business affairs generally, but states himself, that he was not an agent of his father, but only acted in any particular matter by his consent or under his direction. He states that when he informed his father of the sale, he expressed dissatisfaction, and said Swartwout should not have the machine. But it is shown by the testimony that for two years thereafter the plaintiff and defendant continued to use the machine as joint owners, Swartwout [*444] paying one-half of the repairs, and his rights as the owner of one-half being constantly asserted, and as far as appears, never denied until about the time of the commencement of this suit.

The plaintiff demanded the machine from the defendant about the 1st of June, 1861, but whether that was before the commencement of the suit, or after, does not appear from the record. The character of the demand is shown by the testimony of Joseph Evans, Jr., who stated; I went with my father, the plaintiff, to the defendant to get the machine home. We met Mr. Swartwout and my father demanded of him the machine. My father said he wanted the machine; we did not get it, he would not give it to us. On his cross-examination, he said: The machine was my father's. I do not know whether defendant had bought one-half of the machine or not. He would not give it up, he claimed to have bought it.

A verdict was returned for the plaintiff for thirty dollars. A motion for a new trial was overruled, and judgment entered upon the verdict, from which the defendant took this appeal.

The appellant insists, as a ground for reversal, that the verdict was contrary to the evidence; that he was the owner of one-half of the machine, when the verdict was for its entire value; and furthermore, that no sufficient demand was made for the plaintiff's rights in the property, before the institution of the suit.

Mr. JOHN W. WAUGHOP for the appellant.

Mr. E. P. EVANS and Mr. A. GARRISON for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the court.

The evidence in this case shows clearly that the parties owned the reaping machine in common. It is proved that Richard Evans, the son of the plaintiff below, lived with his father, who was old and intemperate, and, in conjunction with his brother Joseph, managed the farm and his father's affairs. Two [*445] years before the commencement of this suit, Richard sold to Swartwout, the defendant below, an undivided half of the machine for twenty-five dollars, and received payment, and although Richard says, in his testimony, that his father was dis-

satisfied with the bargain, yet, independently of Richard's authority, the plaintiff must be considered as having ratified the sale. For it is shown that for two years the parties continued to use the machine as joint owners, Swartwout paying one-half of the repairs, and his rights as the owner of one-half being constantly asserted, and, so far as appears, never denied, until about the time of the commencement of this suit.

Swartwout, then, was entitled to the same possession and enjoyment of the machine as Evans, and could only be made liable for its conversion by proof that he assumed and exercised *exclusive* ownership, repudiating the rights of Evans. The plaintiff below sought to prove that fact by showing a demand and refusal. The only evidence upon that point was that of plaintiff's son Joseph, who testified that his father demanded the machine of Swartwout, and that the latter refused to give it up, claiming to have bought it. But this same witness testified that his father owned the machine, and that he did not know how it had got to Swartwout's house, nor did he know whether Swartwout had bought one-half of the machine. It is manifest, then, that Evans demanded, not the joint use and possession, as joint owner, but the machine as sole owner, and such demand Swartwout was at entire liberty to disregard. *Bell* v. *Shrieve*, 14 Ill., 462. Evans should have demanded the equal enjoyment of the machine as joint owner, and if he demanded possession as sole proprietor, Swartwout was under no obligation to recognize a claim, where recognition might have been fatal to his own title. That such was the character of the demand is clear, not only from the manner in which it is stated by the witness, but from the fact that the plaintiff's case proceeds upon the hypothesis of sole ownership. Besides the evidence of Joseph as above stated, the plaintiff introduces his other son, Richard, for the purpose of proving that although he sold one-half of the [*446] machine to Swartwout, he had no authority to do so, and that his father "was dissatisfied, and said, defendant should not have it." And not only did the plaintiff seek, by his evidence, to prove that he was sole owner, but in the instruction asked by him and given by the court, he submitted the case to the jury on that ground.

But even if plaintiff's demand had been consistent with his rights, and been made as joint instead of sole owner, there is another objection to the demand, which, upon this record is fatal. There is nothing in the record to show that the demand was made before the commencement of the suit. The transcript from the Justice was not filed in the Superior Court until several months after the trial, and although transcribed into the record, we find it impossible to tell when the suit was commenced. This

point was raised by the defendant, on a motion made to the court after the plaintiff closed his evidence. The plaintiff's attention was thus called to the defect in his evidence, and he failed to supply it. There is nothing which would enable the jury to say whether the demand, of which the witness, Joseph Evans, testified, was made before or after the commencement of the suit.

The jury found a verdict for the plaintiff for thirty dollars. In the conflict of evidence as to the value of the machine, we cannot say whether they considered themselves as finding the value of the whole or only one-half. From the mode in which the plaintiff submitted his case, it would be proper to presume that the verdict was for the value of the entire machine, but whether for the whole or the half, it is unsustained by the evidence, for the reasons given, and there must be a new trial.

This case is before us on an order for a re-hearing, and as the question has several times arisen in regard to the taxation of costs in such cases, we take occasion to say that the only additional costs proper to be taxed upon the re-hearing are the costs of the orders made necessary thereby, and costs of filing any papers incident to the re-hearing.

Judgment reversed.

[*447] JAMES MURPHY
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

1. BILL OF EXCEPTIONS—*when necessary.* Affidavits of a sheriff and clerk concerning an alleged irregularity in summoning a petit jury, will not be considered in the Supreme Court unless they are made a part of the record by bill of exceptions.

2. JURY—*whether venire for one week can be served for another.* On the trial of a party upon the charge of murder, the defendant moved to quash the venire for the petit jury, upon the ground of an alleged irregularity in summoning the same, in this: that the venire was issued for jurors selected by the board of supervisors for the third week of the term, and the sheriff, by request of the circuit judge, executed the venire for the second week, and the defendant was thereby compelled to select a jury from a panel not chosen for the week in which he was tried. The alleged irregularity did not properly appear of record, but the court said they were not prepared to hold that such a change, if made, would be ground for reversal.

3. JURY—*when juror over sixty years of age—whether ground of challenge.* That a juror is over sixty years of age does not disqualify him; it is an exception or privilege of which he alone can avail himself. It is not ground of challenge by either party. The rule in *Davis* v. *The People*, 19 Ill., 74, adhered to.

4. EVIDENCE—*dying declarations.* Upon the prosecution of a party on the charge of murder, the statement of the deceased was introduced as his dying declaration. As a foundation for its introduction, it was shown that the statement was taken down on the day preceding his death, and was sworn to. At the time, the wounded man expressed no opinion as to whether death was impending, except by nodding assent when told he would have to swear he had no

hope of life. He had been told by his physician that he could not recover, upon his inquiry whether there was any hope. He partook of the last rites of his church before making the statement. He was under the influence of morphine, and had to be aroused sometimes to get his attention while the statement was being taken. The statement was partly voluntary, and portions of it drawn out by questions to which he sometimes answered and sometimes only nodded assent. The statement was not taken down in his own language, but substantially so. He had made no disposition of his property. The statement was read to him after it was written, and he said it was substantially correct. It was regarded that the condition of mind of the declarant in regard to any hope of recovery, and the manner in which his statements were taken, entitled them to be admitted to the jury as his dying declarations.

5. But on account of his condition, his statements were not entitled to [*448] much weight, and would not, alone, sustain a verdict of guilty, even of manslaughter.

6. CRIMINAL LAW — *malice implied — burthen of proof.* Upon the trial of a party upon the charge of murder, it being proven that he inflicted the mortal wound, the law implies the malice, and it devolves upon him to show the justification or mitigation, to reduce it from murder or to obtain an acquittal, unless the whole circumstances show that it was not accompanied with malice.

7. SAME — *of justifiable homicide.* It cannot be said that a man doing all within his power to take the life of another with a gun, is justified in so doing, because the person assailed endeavors simply to dispossess the assailant of the weapon as a means of preserving his own life, although it may have contributed, unintentionally, to the discharge of the gun.

8. INSTRUCTIONS — *when a portion of a series are improper, may be corrected by others.* As a general rule, instructions depend upon themselves, but when a series are taken together, some of which are incorrect in themselves, may be so explained by others as to render them free from objection.

9. SAME — *may be refused if already given.* When a legal principle has once been announced in an instruction, there is no necessity for its repetition, and it is not error to refuse to give it in a second instruction.

10. SAME — *must be relevant.* It is not error to refuse an instruction when there is no evidence tending to support the hypothesis upon which it is based.

WRIT OF ERROR to the Circuit Court of Kane county; the Hon. I. G. WILSON, Judge, presiding.

James Murphy was indicted in the court below, at the October term, 1863, for the alleged murder of William Shies.

The cause was tried at the February term, 1865. The court convened for that term on the 6th day of February, and on the 21st of the same month, the case was called for trial. Before the impaneling of the jury, the defendant moved the court to quash the *venire*, upon the ground that the jurors were selected by the board of supervisors, and the writ of *venire facias* issued commanding that they be summoned to attend the second week of the term, whereas the sheriff, without proper authority, and at the request of the circuit judge, summoned the jurors named therein to attend at the third week of the term, so that the defendant would thereby be compelled to select a [*449] jury from a panel chosen for a different week from that in which he was to be tried. The court overruled the motion, and exception was taken.

The call of the jury was then proceeded with, and among those

called was *Samuel Pennock*, who, upon being examined, stated that he was over sixty years of age. The defendant thereupon proposed to challenge the juror for that cause, but the court ruled that the age of the juror was no cause for challenge, and the defendant excepted. The defendant then challenged the juror peremptorily.

The jury being impaneled, the cause proceeded to trial.

The principal circumstances attending the homicide were substantially as follows: — On the evening of the 23d of August, 1863, Shies, the deceased, and a man by the name of McDonald, who was deaf and dumb, were sitting in the saloon of one Rang, in Aurora, conversing with each other in writing. While thus occupied, Murphy, the accused, came into the saloon, and approaching Shies, made some remark to him which was not heard by the witnesses. Shies told him not to say anything to him while he was busy writing. Murphy thereupon, at the request of the proprietor of the saloon, immediately left the room. In ten or fifteen minutes afterwards, Shies and McDonald left the house. In a short time, McDonald returned to the saloon, indicating that he wished the persons present to follow him; they did so, and found Shies prostrate in the middle of the road, and Murphy on him. The parties were separated, Murphy appearing angry at the interference, and went to his house some little distance away and procured a gun. Shies in the meantime followed in the same direction, and approaching Murphy, who was in or near his own gate, said he wished to speak to him and explain and be friendly. Murphy responded, telling him not to approach any nearer, and the gun immediately went off, shooting Shies, [*450] causing his death on the fourth day afterwards. It seems at the time, or just preceding the shooting, Shies held the muzzle of the gun, trying to push it one side. Some evidence was introduced to show that Murphy apprehended an attack at the time Shies approached him at his house, and many details of the circumstances are given, which it is not material to the case here to mention.

During the trial, the prosecution proposed to introduce in evidence certain statements made by Shies concerning the occurrence, as his dying declaration, and to lay the foundation therefor, presented the testimony of *Dr. C. D. Howell*, who testified as follows: I am a physician; I called to see Shies the night he was wounded; his bowels were protruding; it was a ragged, lacerated wound through the walls of the abdomen; there was no hope of his recovery; he asked me at the time if there was any chance, and I told him none at all; he died four days after; I was present on the day preceding his death, when he made his dying

declarations; a part of it is in my hand writing; the paper now shown me is according to his statement.

Searles testified that he also was present at the time of taking the dying declarations of Shies, and swore him to them after they were written out. He stated that he commenced writing himself, but was excited, and asked Mr. Metzner to finish it, which he did. He said that Shies made all the statements contained in the paper, and that it was read over to him after it was written, by whom he was not certain.

Metzner was also present. He said that Searles was nervous and requested him to draw up the formal part of the declaration of Shies, which he did. He read the statement to him after it was written. Shies did not sign his own name to it, he was too far gone. He requested him to make a statement of the facts, telling him we wanted to use it as his dying declaration; he would go on, then rest — waited several minutes before [*451] he would respond with another sentence. The statement was partly made upon his own suggestion and partly by interrogatories. The witness could not distinguish between the portion that was voluntary and that which was drawn out by questions. In taking down the statement, he did not use Shies' language, but the substance was his. That portion relating to his death was more his language than the witness'. When the declaration was read to him, he said it was substantially correct. Shies, at the time, did not express any hope of life or certainty of death. When witness wrote the caption, he told Shies he would have to state, under oath, that he had no hope of life. To this he did not answer, but nodded assent. Witness thought Shies had made no disposition of his property. While the statement was being taken, he seemed to be under the influence of morphine — would now and then fall asleep, hesitate and nodded assent. When asked if the declaration contained the substance of facts he nodded assent.

Dr. Howell, re-examined, said at the time the declaration was taken, Shies' mind, he thought, was clear; thought he had no difficulty in understanding questions or what was said. The cause of his hesitancy was over excitement. Witness could discover no incoherence in the statement taken down. Witness thought Shies inquired of him about that time if he had any chance of recovery, and he told him he had none. Shies expressed no opinion as to his condition, but asked witness how long he would probably live. A clergyman attended him at one time during his illness, and administered the sacrament to him. Witness said he was not present at the time the statement was made.

The State's attorney then offered in evidence to the jury the

written statement of Shies, spoken of by the witnesses, as his dying declaration. The defendant objected; the court overruled the objection, and exception was taken.

The declaration of Shies was as follows:

[*452] STATE OF ILLINOIS, } ss.
KANE COUNTY. }

I, William Shies, of the county of Kane, State of Illinois, having no hope of life, and having the fear of God before me, do declare this to be a true statement of facts of an occurrence hereinafter related:

On the evening of the 23d day of August, A. D. 1863, myself and one McDonald started for home; I went to accompany him. When we were going by the house of James Murphy, said Murphy came running out of the house into the road with a hickory club. He struck Dummy with a club on the sidewalk, in front of Murphy's house; he then knocked down Dummy with a hickory club. After he struck Dummy with a club, I clinched the Irishman, to prevent his striking him again; we then had a struggle together. Dummy got up as quick as he could, and went to Fred Rang's for help. I called Dummy back, fearing the Irishman would hurt me, as he was too strong. When Dummy came back from Rang's, Rang came with him; the Irishman at that time had me down; Rang took the Irishman off from me; the Irishman then ran into his house and got his gun, and came out in the street again; I stepped toward him and told him I wanted to talk with him; he said I must not come near him as the gun would go off; I said to him, "What have I done to you that you treat me in this way?" and that I did not want to hurt him; I saw the gun in his hand at this time; I was in reach of the gun, and tried to push it away, as I saw that he was going to shoot me, but could not; he then shot me in the bowels; I never had any difficulty with the Irishman before; his name is James Murphy.

Sworn and Subscribed, etc., and signed by four witnesses.

The instructions given on both sides were voluminous, and being spoken of in the opinion as a series, objectionable features in some corrected in others, and no important doctrines to be drawn from them, it would subserve no valuable purpose to insert them here.

[*453] The following are the first, second, eighth and ninth instructions asked by the defendant and refused by the court:

1. If the jury believe, from the evidence, that Murphy, at his own gate, had a loaded gun in his hands, for the purpose of defending himself from a real or fancied assault of Shies, or his

comrades, and Shies hold the muzzle of the gun, and in a struggle or controversy over the gun, or for the possession of it, or to turn it aside, Shies thereby in any manner contributed to the discharge of the gun, and that the gun went off and wounded Shies, of which wound Shies died, then the jury must acquit Murphy; and if, from all the evidence in the case, there is a reasonable doubt whether or not such is really the fact in the case, the jury should acquit, it being the duty of the jury to give the defendant the benefit of every reasonable doubt.

2. If the jury believe, from the evidence, that both Shies and Murphy had a struggle about a gun, and in that struggle the gun went off and wounded Shies, of which wound Shies died, and that that struggle contributed in any degree to the discharge of the gun, then the jury should find for the defendant; and if there is a reasonable doubt, based upon and growing out of the evidence, whether or not such was the fact, then the defendant is entitled to the benefit of that doubt, and then the jury should acquit.

8. If, from the evidence, it is uncertain in the minds of the jury whether the discharge of the gun spoken of in the case was the sole act of Murphy, or was the joint act of Murphy and the deceased, then they must find the prisoner not guilty.

9. If the jury believe, from all the evidence in this case, that Murphy had hold of one end of the gun in question, and Shies, the deceased, the other, and in a struggle over the gun for the possession, and then if the gun in question went off and killed Shies, and that the struggle over the gun was the real cause of the discharge of the gun, then in that case the jury should acquit.

Five other instructions were asked by the defendant, [*454] and refused, but are regarded as having been embraced in those already given.

The jury returned a verdict of guilty of manslaughter, and fixed the term for the confinement of the defendant in the penitentiary at twenty-five years.

The defendant thereupon moved for a new trial and in arrest of judgment, and in support thereof presented the affidavits of the clerk of the County Court and sheriff, which are not preserved, however, in the bill of exceptions.

Affidavit of the clerk of County Court of Kane county, and *ex-officio* clerk of Board of Supervisors; has been for three years; says that it has been the practice of the Board of Supervisors to select such individuals for grand and petit jurors for the Circuit Court of Kane county as each member saw fit from his town. Said names were given to the clerk, and he issued a venire to the sheriff of Kane county to summon said persons. Stated that in no other manner have they been selected.

Affidavit of the sheriff, states that he received venire in apt time to serve for the third week of term from proper clerk. That instead of serving the same as commanded in said venire, he, as he supposed he had a right to do, so far as he did serve the same, summoned the said jurors to appear on the second week of said term. That he did so at the request of I. G. Wilson, Judge of said court.

The court overruled the motions, and the defendant excepted. Judgment was entered upon the verdict, and thereupon the defendant sued out this writ of error.

The following are the errors assigned:

1. The court erred in not sustaining the defendant's challenge to the array of jurors, and quashing the venire.

2. The court erred in not sustaining the defendant's challenge for cause to the juror, Pennock.

3. The court erred in admitting the dying declaration of Shies.

[*455] 4. The court erred in giving plaintiff's instructions, and each of them.

5. The court erred in refusing defendant's instructions, and each of them.

6. The verdict is contrary to law and evidence.

Mr. B. F. PARKS for the plaintiff in error.

Mr. CHARLES BLANCHARD, State's attorney, for the people.

Mr. CHIEF JUSTICE WALKER delivered the opinion of a majority of the court:

It is insisted that the court below erred in refusing to quash the venire for the petit jury. That a panel was chosen, and a *venire facias* was issued requiring the attendance of the jurors on the third week of the term, whilst it afterwards changed, without authority, requiring their attendance on the second week, and they were summoned and attended at the latter named time. And that accused was thereby compelled to select a jury from the panel chosen for a different week than that on which he was tried. The court was convened on the 6th day of February, 1865, and the trial commenced on the 21st day of that month. It thus appears that the trial was had during the third week of the term. But the affidavits of the sheriff and the clerk are not made a part of the record by a bill of exceptions, and cannot, therefore, be considered, and we are unable to see from the record, that accused did not have the proper panel from which to select a jury on his trial. But we are not prepared to hold, that such a change, if it had occurred, would have been ground of reversal.

The accused, on the trial below, peremptorily challenged a juror,

because he was over sixty years of age, but the court refused to allow the challenge, which is assigned for error. It was held in the case of *Davis* v. *The people*, 19 Ill., 74, that [*456] this was not a disqualification, but was an exemption or privilege of which the juror could alone avail himself. But was not ground of challenge by either party. We see no reason to change the rule there announced.

It is urged with great earnestness that the court below erred, in receiving the declarations of deceased, without a proper foundation. It is contended, that it does not sufficiently appear that deceased, when he made the statements, was aware of his situation, and had lost all hope of recovery. Metzner testifies that he was present at the time, and drew up the caption of the statement made by deceased, and informed him that he would have to swear to it; that he read it over to him. This witness says he heard deceased express no opinion as to whether he believed he would recover or not, but he inquired of witness for his opinion, when he informed him that he believed he would not recover, and Shies died the next day.

Searles testifies that he was present and heard the statements made, and being read to the deceased, he swore him to their truth. Metzner states that he took down the substance of the statement, not using the precise language of the deceased. He also states that deceased was under the influence of morphine, and that to some of the questions he nodded assent, and to others he gave answers. At times while the declaration was being made, it became necessary to rouse him before it could proceed. It also appears that he was visited by his spiritual adviser, and partook of the last rites of his church, before the declarations were made, and we think that it appears he must have lost all hope of recovery, and his declarations were so taken as to authorize them to be read to the jury.

It is, however, true, that from the condition of deceased, when they were taken, they are not entitled to much weight, and they alone could not sustain the verdict. But they in most material points are corroborated by other evidence. In fact there was an abundance of evidence independent of this to sus- [*457] tain the verdict. We cannot say that it tended to mislead the jury. These declarations were before them for their consideration, and they no doubt considered all the circumstances which attended them when made, and gave to them no more weight than they were entitled to receive. Again, the attending physician gives the statements of deceased made to him, in reference to the occurence, and it in the main corresponds with the written statement, although more favorable to the accused. And when the whole testimony is considered outside and independent of

these declarations, there was, we think, an abundance of evidence to warrant the conclusion at which the jury arrived. It was proved beyond all reasonable doubt that the accused inflicted the mortal wound, and this being established, the law implies the malice, and it devolved upon him to show the justification or mitigation, to reduce it from murder, or to obtain an acquittal, unless the whole circumstances show that it was not accompanied by malice.

Some confusion seems to exist in the evidence as to some circumstances connected with the transaction. After the fight occurred in the street, as to how or why it took place, there seems to be no evidence, plaintiff in error went into his house and procured his gun, and returned with it—some of the witnesses say into the street, and others that he remained inside of his enclosure. This shows that he did not decline the fight, as he at least advanced from the inside of his house to his gate, if not into the street, apparently seeking the contest. There is no evidence that he advanced for any other purpose, nor does it appear that deceased was endeavoring to enter his premises, or to inflict injury on him or his property. It is true that he warned deceased not to advance or he would shoot. There is no evidence that deceased was armed, or was advancing in a menacing manner, but on the contrary he was assuring accused that he intended no harm, but wished to explain and be friendly.

The deceased seems to have attempted to turn the muzzle of the gun to one side, and in doing so, appeared to be afraid [*458] that accused would shoot. He probably feared to retreat, and saw no other means of escape. We are unable to see anything in the evidence, from which it appears that the life of accused was in danger, or that he was likely to receive a grievous bodily injury, and nothing to excite apparently a well-grounded fear of such results. When considered altogether, we think the evidence could not fail to convince the jury that there was a want of justification in the killing, and this, too, whether the declarations were received or were rejected.

It is likewise insisted that the court erred in giving instructions asked by the prosecution, and in refusing a portion of those asked by the accused. After a careful examination of the instructions given for the people, we find them correct, or made so by those given for the defense. As a general rule, instructions depend upon themselves, but they, when taken together, may, and frequently do, by explaining others, become freed from objections. In the twelve given for the defendant, the law of the case seems to be clearly announced, so far as it was applicable to the facts of the case. And those given for the defense, with one or two exceptions, announce the principles contained in those that

were refused. When a legal principle has been once announced, there can be no necessity for its repetition, and there can be no error in refusing to give it in a second instruction.

The refusal to give the first, second, eighth and ninth of the instructions asked by defendant below, is principally complained of as error. They, in a variety of ways, state that if there was a struggle between the accused and the deceased for possession of the gun, and it was discharged in consequence of the struggle, they should acquit. We are unable to perceive any evidence, or anything tending to prove a struggle for possession of the gun. There was a contrariety of evidence whether deceased had hold of the gun when it was discharged. But even if there was such evidence, it may have been that deceased saw that the only means he had to prevent accused from shooting him was to wrest it from the accused. In such a case, it cannot be [*459] said that a man doing all within his power to take the life of another is justified in doing so because the person assailed endeavors simply to dispossess the assailant of the weapon as a means of preserving his own life, although it may have contributed unintentionally to the discharge of the gun. Such a rule would deny to the person assailed the means of self-defense, and warrant the aggressor in perpetrating his purpose, simply because the other endeavored, as the only means presenting itself to save his life, to take from him the deadly weapon.

In the remaining five instructions asked, and refused, we perceive no error. So far as they contain correct principles, they had already been given, and there was no reason for their repetition. From the entire record in the case, it appears that the accused has had a fair trial, and that no error has intervened in his conviction. The judgment of the court below must, therefore, be affirmed.

Judgment affirmed.

WILLIAM W. ARMSTRONG

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. VERDICT—*in criminal cases—surplusage will not vitiate.* In a prosecution of a party for administering drugs to a woman then pregnant with child, with intent to produce a miscarriage, the jury found the defendant guilty, and fixed his term of imprisonment in the penitentiary, "together with a fine of one hundred dollars." The jury were not authorized under the law to fix any fine, yet the attempt thus to do so did not vitiate the verdict; that portion of it was rejected as surplusage.

2. SAME—*general verdict of "guilty."* A general verdict of "guilty," is sufficient, without specifying of what offense, either by description, by reference to the indictment, or otherwise. It is understood to mean, guilty of the offense charged in the indictment.

[*460] 3. SAME—*upon several counts.* It is no matter how many counts an indictment may contain, a general verdict of guilty, is a finding upon all of them.

4. JUDGMENT—*imposing a fine—adopting an improper verdict.* Where a court, in entering a judgment upon a verdict in a criminal cause, which found the defendant guilty, and in addition to fixing the term of imprisonment, which it might do, also imposed a fine, which the jury could not do, adopted the verdict entire, it is *held*, the court having the power to impose the fine, its judgment would be none the less valid because of the adoption of the amount improperly fixed in the verdict.

WRIT OF ERROR to the Circuit Court of Rock Island county; the Hon. IRA O. WILKINSON, Judge, presiding.

This was an indictment in the court below against William W. Armstrong for feloniously administering, to a woman then pregnant with child, certain drugs and liquids with intent to procure a miscarriage.

The verdict of the jury was as follows:

"*The People of the State of Illinois* v. *William W. Armstrong;* We the jury in the above case find the defendant guilty, and fix his term of imprisonment in the penitentiary at two years, together with a fine of one hundred dollars."

The court adopted the verdict and entered a judgment accordingly. The defendant sued out this writ of error, and now questions the correctness of the verdict and judgment.

Mr. J. B. HAWLEY and Mr. GEO. W. PLEASANTS for the plaintiff in error:

The verdict is insufficient to warrant the judgment, or any judgment upon it.

1. The imposition of the fine is a material part of the verdict, and vitiates the verdict because the jury had no authority to impose it. *Gerard* v. *The People*, 3 Scam., 362; *Holliday* v. *The People*, 4 Gilm., 111.

The statutes under which the cases cited arose were identical in language with that in this case. Laws of 1833, p. 175, § 29, and p. 179, § 46; *Purple's Statutes*, p. 365, § 46.

[*461] The court could not lawfully adopt the finding of the jury as to the above fine, and if it did, such adoption could not amend the verdict. The jury alone could amend their verdict in matter of substance.

2. The verdict is bad, for uncertainty, in not finding any specific offense, by description, by reference to the indictment or otherwise; and nothing can be taken by implication or intendment in a criminal case. *Highland* v. *The People*, 1 Scam., 394; 1 Chitty's Cr. Law, 365; *Lady Alice Lisles' Case*, State Trials, Vol. 11, p. 374; *Rookwood's Case*, State Trials, Vol. 13, p. 222; *Cranburne's Case*, State Trials, Vol. 13, p. 266.

The Statute of Jeofails does not apply to criminal cases.

Mr. CHARLES BLANCHARD, State's attorney, for the people:

While conceding that the jury had no authority to impose a fine, yet insisted that portion of the verdict which was unauthorized might be rejected as surplusage. *Coit* v. *Wolfes*, 1 Min., 134.

Mr. JUSTICE BREESE delivered the opinion of the court:

This was an indictment in the Rock Island Circuit Court against the plaintiff in error for feloniously administering to a woman then pregnant with child, certain drugs and liquids, with intent to procure a miscarriage.

The indictment was found under section 46 of the criminal code which is in these words: Every person who shall administer or cause to be administered or taken any such poison, substance or liquid with intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years in the penitentiary and fined in a sum not exceeding one thousand dollars. *Scates' Comp.* 381. The plea was not guilty.

A trial was had, and the following verdict was rendered: We the jury in the above case, find the defendant guilty, and fix his term of imprisonment in the penitentiary at two years, together with a fine of one hundred dollars. A [*462] motion was duly entered to set aside this verdict, which being overruled, a motion was then entered to arrest the judgment, which was also overruled, and the court, thereupon, in entering judgment, adopted the finding of the jury and assessed a fine of one hundred dollars, together with the costs.

The case is brought here by writ of error, and the only point made by plaintiff in error is, that the verdict is insufficient to warrant the judgment entered or any judgment upon it.

It is conceded on both sides, that it was not competent for the jury to impose a fine upon the prisoner — they had only to determine the question of guilt, and to fix the term of imprisonment if found guilty. The question then arises, does this imposition of a fine by the jury, vitiate the verdict?

The old maxim, *utile per inutile non vitiatur*, is a salutary maxim, and is recognized in criminal, as well as in civil cases. The useful portion of this verdict, is the finding of guilty, and finding the term of imprisonment; the useless or superfluous portion, is the imposition of the fine. Without this portion of the verdict, the finding of the jury is unexceptionable on this point. This part of the verdict then, must be held as surplusage, and as such, not vitiating the other part, which the jury properly found. But it is said, the verdict is insufficient because it does

not find the accused guilty of any specific offense, either by description, by reference to the indictment or otherwise.

Formerly, much strictness was required and observed in all criminal prosecutions. A culprit was required to be formally arraigned, and for purposes of identification, to hold up his hand and to be asked with great form and solemnity if he was guilty or not guilty, and if not guilty how would he be tried, and when the jury returned their verdict, they were required by the court to look upon the prisoner, and to the inquiry how do you find him, guilty or not guilty, then to respond guilty as charged, or [*463] not guilty, as the case might be. But in modern practice these forms have been dispensed with, and the silent entry of the plea of not guilty by the accused himself or by his counsel, fulfills every requirement of the law as now understood and practiced. In those times of great strictness, a verdict would probably, have been held insufficient, which merely found the accused guilty, without the addition of, as charged, or as charged in the indictment, and some of the authorities go to that extent. But all criminal proceedings must be looked at in the light of common sense. What was the jury trying in this case? and what was the plea? It was the specific offense charged in the indictment and the plea was not guilty of that offense. The jury responded to the issue, that the accused was guilty. Guilty of what? Can there be any other answer or reasonable understanding of the verdict, than that he was guilty of the offense charged? What other matter was the jury trying? There was no other offense before them, with which the accused was charged but the one described in the indictment, and the response by the jury of guilty, can be taken to mean nothing more or less, than that he was found guilty of the charge in the indictment. It is no matter how many counts an indictment may contain, a general verdict of guilty, is a finding upon all of them.

The case of *Highland* v. *The People*, 1 Seam. 392, to which plaintiff in error refers, was a case of larceny. The indictment contained two counts, in one of which the goods were described as of the value of twenty dollars. The verdict was as follows: We the jury find the defendant guilty and sentence him to the penitentiary for the term of three years. A motion in arrest of judgment was entered, and the following among other reasons were assigned in support of it. That the verdict is insufficient, because the jury did not find, by their verdict, that the defendant was guilty in manner and form as charged in the indictment. The jury did not find that the value of the goods stolen amounted to five dollars or more.

[*464] The first ground, this court did not consider well taken, as it was not noticed in the decision of the cause. The

judgment was reversed on the ground that the verdict did not find the value of the property stolen, for the value of the property constituted the degree of the offense. If it was of less value than five dollars, it was not an offense punishable by imprisonment in the penitentiary, but in the county jail, hence the necessity that the verdict should find the value.

In this case, all the counts are of similar import, and the punishment the same under each and all, therefore, there was no necessity for anything more than a general finding of guilty by the jury, and fixing the term of imprisonment.

As to the suggestion that the court could not adopt the amount found by the jury, as its judgment as to the fine proper to be imposed, it is only necessary to say, the court was not prohibited from receiving the suggestion of a bystander on this point, provided the court was willing to take the responsibility, and incorporate it into its judgment. It does not matter in what way the mind of the court was influenced as to the amount of the fine, so it was not corruptly influenced, and the court had power to impose the fine.

What injury could possibly result, or could be worked to the prisoner, from the fact that the jury assumed the right to impose a fine? We can see none. On the contrary, such action of the jury, on the supposition they had the power to fine, doubtless induced them to fix a short term of imprisonment, so that the prisoner was really benefited by such mistaken action. And the court, in adopting the judgment of the jury as its judgment, as to the amount of the fine, relieved the prisoner from a heavier fine which the court might have imposed.

We see no error in the record, and must affirm the judgment.

Judgment affirmed.

The American Express Company [*465]
v.
David D. Haggard.

1. Plea in abatement — *motion — which may be resorted to.* Where a party who is sued as a corporation seeks to raise the question whether the defendant is a corporation, upon matter *dehors* the record, the question is one to be presented by plea in abatement and not by motion.

2. Plea in abatement — *must give a better writ.* In an action against the American Express Company, sued as a corporation, a plea in abatement was filed in the names of "Johnston Livingston, William G. Fargo, Henry Wells and others," admitting that they, "together with others," were doing business under the name by which they were sued, but denying that the company was a corporation. The plea was held bad, because it did not give the plaintiff a better writ.

3. It should have set forth who were the "others" with whom Livingston, Fargo and Wells say they were doing business, under the name of the American

Express Company, in order that the plaintiff might know against whom to bring his suit, if the plea should prove to be true.

4. WITNESS — *competency — interest.* The clerk of a party to whom a package of money was sent by express, receipted for the package, supposing at the time he was receipting for some other articles, and did not in fact receive the money package. The loss of the money being discovered, and also that the clerk had receipted for it, his father, upon being apprised of the facts voluntarily paid to the owner the amount of the loss. In a suit subsequently brought by such owner against the express company to recover the money lost, his clerk was held to be a competent witness in his behalf, to prove that the money was not received. His liability to the plaintiff was discharged, and he assumed none to his father who paid the money voluntarily.

5. RIGHT OF ACTION — *whether it is extinguished by a payment by a third person.* Where A is primarily liable, and B only secondarily, A may still be sued for the benefit of B, though B has paid the debt.

6. SAME — *in case of the loss of property which is insured.* Thus, if insured property is destroyed by the act of a wrong doer, though the insurance company may have paid the loss, the owner of the property may still sue the wrong doer, and the recovery will be for the benefit of the insurance company.

7 SAME — *in case of loss by an express company.* So in this case, a package of money sent by express was never received by the one to whom it was sent, but was receipted for by his clerk through mistake. The father of the clerk, on being apprised of the circumstances, paid the amount of the loss [*466] to the owner. It was held this payment was not for the benefit of the express company, and discharged no right of action which existed against them. The owner might still sue the company to recover the money lost, for the use of the father of the clerk.

8. BENEFICIAL PLAINTIFF — *need not be named in the record.* The fact that a suit is brought for the use of a third person need not be expressed upon the record.

9. EVIDENCE — *upon cross-examination — what is competent.* In an action against an express company to recover for money alleged to have been entrusted to them, but never delivered, and for which a receipt had been given by a clerk of the owner, by mistake, supposing he was receipting for other articles, the company proved by one of their agents the custom of their drivers never to deliver packages without getting a receipt, and that they always took the packages to the consignee when they called for the receipt. The plaintiff, on the cross-examination, proved that it was the custom of the particular driver who had this package, to steal money parcels, and that some time after this occurrence, the company arrested him, made him surrender $850 in money and some valuable jewelry, and that the driver escaped from the officer and ran away. *Held*, that after the examination in chief, this evidence upon the cross-examination was admissible.

10. DELIVERY OF GOODS — *by an express company — what constitutes.* A delivery of a package by an express company, to discharge the company, must be actual and *bona fide*, and not merely formal.

11. So, if the agent of the company abstracts a parcel while in the act of delivering it, it is no delivery, and the company will be liable even though a receipt be signed and the form of delivery gone through, by the agent's laying the property for a moment out of his hands.

12. COMMON CARRIERS — *responsible for the honesty of their agents.* An express company is a common carrier, and must be held to the strictest responsibility for the honesty of its agents, and if one of them abstract a parcel while in the act of delivering it, the company will be liable.

APPEAL from the Circuit Court of McLean County; the Hon. JOHN M. SCOTT, Judge, presiding.

David D. Haggard brought this action on the case in the court below, against the American Express Company, to recover

for a package of money sent to the plaintiff at Bloomington, Ill., by his agent, from Clinton, in DeWitt county. The company was sued as a corporation, and there was service upon their agent at Bloomington, in the manner prescribed by the statute for service upon corporations.

The defendants appeared and moved to quash the sher- [*467] iff's return upon the summons, and in support thereof presented the following affidavit of the agent upon whom the service was had:

Luther A. Fuller, being duly sworn, on his oath says that the summons in the above case was served upon affiant, and affiant says he is not now, and was not at the date of said service, and never has been the agent of any such corporation as the American Express Company, and that he knows of no such corporation, and further saith not.

The court overruled the motion, and exception was taken.

The defendants thereupon filed a plea in abatement, as follows:

JOHNSTON LIVINGSTON, WILLIAM G. FARGO and HENRY WELLS and others, who are sued by the name of the American Express Company,
against
DAVID D. HAGGARD.

McLean County Circuit Court—December Term, 1864.

The said Livingston, Fargo and Wells, say that they, as the firm of Livingston, Fargo & Co., together with others under the firm of Wells, Butterfield & Co., are engaged in the business of transporting by express between various points in the State of Illinois, under the general name of the American Express Company; that there is not now, and never has been any body politic or corporate, under the name or style of the American Express Company, either in the State of Illinois or elsewhere, and this they are ready to verify. Wherefore they pray judgment of the said writ and declaration, and that the same may be quashed.

Which was duly verified by affidavit.

A demurrer to this plea was sustained. The plea of the [*468] general issue was filed, and the cause proceeded to trial before the court, without a jury.

The plaintiff having proved the delivery of the package to the company, introduced *W. Haggard*, who testified as follows:

In July, 1863, I was in the employment of the plaintiff, at Bloomington, as clerk. The package of money spoken of by the last witness was never delivered to me. I went to the office of the

defendant, in Bloomington, about a week after it was sent, with the plaintiff, and there saw a receipt for said package which I had signed. The receipt was in the book in which the express company took receipts, and was in my handwriting. I did not at first remember anything about it. After reflecting, and seeing the receipt, I then recollected of Jacob Shook, the driver who delivered packages for the express company, coming to the store of the plaintiff, and of my signing the receipt. I did not get the package at the time I signed the receipt. I supposed that it was for a package of castings, and was left on the sidewalk. The plaintiff is a hardware merchant, and sells reapers and other agricultural machinery. I was in the habit of signing for packages of castings often, sometimes two or three times a day, and had receipted for money, and had authority to do so. After it was discovered that the package was lost, I wrote to my father in Chicago about it, stating the facts, and he paid the plaintiff (who is my uncle) the amount of the loss, and charged it to me. I did not request my father to pay it. I was then under twenty-one years of age, and am still so.

The counsel objected to the examination of this witness on the ground of his interest, which objection was overruled by the court, and the defendant then and there excepted.

[*469] Being cross-examined, the witness further testified: When Shook, the driver, came to the store, I gave him the receipt now shown to me. I think some customers were in the store at the time. Plaintiff was not in the store. I think the receipt book was on the show-case when I signed the receipt. Shook stood by the counter. I saw no package, nor did he call my attention to any package. Shook was in the habit of laying packages of castings on the sidewalk and coming in and getting a receipt. If Shook had laid it down on the counter, it might have been taken up by somebody else. I did not look for any package then, nor at any time afterwards. I did not think of it again till I was told that it was lost and that I had receipted for it. I did not then recollect anything at all about it. After two or three days, when I saw the receipt, I recollected that I had given to Shook a receipt, as I have stated.

The plaintiff here rested his case.

The defendant then called as a witness *L. W. Fuller*, who testified:

I have been in the employ of the defendants about eight years, as agent having charge of offices. The business of drivers is to deliver packages, and collect the charges, and get receipts for packages. He is not allowed to deliver without getting a receipt, and always takes the package to the consignee, when he calls for the receipt.

Being cross-examined, this witness testified that Jacob Shook, formerly driver for defendants, stole property that had been brought by express; he took out of part packages that came in bad order, and delivered the balance; he was discharged by the defendants; before he was discharged, he was arrested, and gave up about $850, and some valuable jewelry to the defendants. This was not equal to the amount he had stolen. I do not know that this claim of the plaintiff was included in the claim against Shook; I do not recollect about that. I think I spoke to the detective who had Shook in custody about this claim [*470] of plaintiff, and may have stated the amount to him; also about one claimed to have been lost by Mr. Hyde, together with other losses. The detective got all the money and jewelry that was got from Shook, and delivered the same to me. The detective turned Shook over to an officer of the law from whom he escaped and fled from justice.

The defendant objected to the testimony called out on cross-examination, which objection was overruled by the court, and the defendant excepted.

The court found the issue for the plaintiff, and rendered judgment accordingly. The defendants thereupon took this appeal, and now assign for error:

1. That the court overruled their motion to quash the return on the summons.
2. The sustaining the demurrer to the plea in abatement.
3. Finding the issue for the plaintiff.

Mr. R. E. Williams, for the appellants.

Mr. W. H. Hanna, for the appellee.

Mr. Justice Lawrence delivered the opinion of the court:

This was an action on the case brought by the appellee, David D. Haggard, against the American Express Company, for not delivering a package of money containing $170.30, sent to the appellee at Bloomington, Ill. The company was sued as a corporation, the Legislature of this State having incorporated the persons who defended this suit by a public act to be found on page 379 of the Laws of 1859. There was service on the agent at Bloomington in the manner prescribed by the statute for service on corporations. The agent came in, and, without denying that he was the agent of the company, denied that he was the agent of such a corporation, and said he knew of no such corporation, and on this affidavit, moved to quash the return, which motion [*471] the court overruled. The object of the affidavit was to raise the question as to whether the defendants was a corporation, and as this was matter *dehors* the record the question was one to

be presented by plea in abatement and not by motion. *Holloway* v. *Freeman*, 22 Ill., 201.

The counsel for the appellant then filed a plea in abatement in the name of "Johnston Livingston, William G. Fargo, Henry Wells and others," admitting that they, "together with others," are doing business under the name of the American Express Company, but denying that said company is now, or ever has been, a corporation. A demurrer was sustained to this plea, and properly. It is defective in not giving the plaintiff a better writ. 1 Chitty, 446. It should have set forth who were the "others," with whom Livingston, Fargo and Wells say they are doing business, under the name of the American Express Company, in order that the plaintiff might know against whom to bring his suit, if the plea should prove to be true.

The admission of the testimony of W. Haggard is also assigned for error. It appears that the witness was a clerk in the hardware store of the plaintiff, who was his uncle; that he was in the habit of often receipting to the company for goods, sometimes two or three times a day, and that he receipted for the package in question, supposing, as he swears, that he was receipting for castings that had been left on the sidewalk. He swears he never received the money in question. After its loss was discovered, with the fact that the witness had given the company a receipt for it, he wrote to his father in Chicago, stating the circumstances, and thereupon his father paid to the plaintiff the amount of his loss. The witness was a minor, and the money was not paid at his request. He clearly had no legal interest in the event of this suit, and was a competent witness. His liability to the plaintiff is discharged, and he has assumed none to his father, who voluntarily came forward and paid the money.

[*472] It is further urged that this payment of money has satisfied the plaintiff's claim, and that his right of action is thereby gone. But the payment was not made for the benefit of the express company, and discharged no right of action which existed against them. This suit may be still prosecuted for the use of the father of the clerk, and such use need not be expressed upon the record. Where A is primarily liable, and B only secondarily, A may still be sued for the benefit of B, though B has paid the debt. Thus, if insured property is destroyed by the act of a wrong doer, though the insurance company may have paid the loss, the owner of the property may still sue the wrong doer, and the recovery of the property will be for the use of the insurance company. *Mason* v. *Lainsbury*, 3 Doug., 61; *Hart* v. *Western Railroad*, 13 Met., 99.

It is also urged that the evidence of Fuller called out on the cross-examination was improperly received. Fuller was the agent

of the company, and was put upon the stand by them to prove the custom of the drivers of the express wagons, in regard to the delivery of parcels and taking of receipts. The plaintiff, on the cross-examination, proved that it was the custom of the particular driver who had this package to steal money parcels, and that some time after this occurrence the company arrested him, made him surrender $850 in money and some valuable jewelry, and that the driver escaped from the officer and ran away. We think, after the examination in chief, this evidence was admissible.

The counsel for the appellants further urges, that even if the driver, having laid the package on the counter, stole it while the clerk was signing the receipt, the delivery was complete and the company discharged. But a delivery, to discharge the company, must be actual and *bona fide*, and not merely formal. Here the clerk swears there was no delivery, that he neither saw nor heard of a package of money, and thought he was receipting for a package of castings on the sidewalk. The company is a common carrier and must be held to the strictest responsi- [*473] bility for the honesty of its agents, and if one of them abstract a parcel while in the act of delivering it, the company will be liable even though a receipt be signed and the form of delivery gone through, by the driver's laying the property, for a moment, out of his hands. We find no error in the record.

Judgment affirmed.

JOHN J. HAMILTON
v.
MARY M. DOOLITTLE *et al.*

1. WITNESS—*competency—interest.* A grantor in a deed containing covenants for title, is not a competent witness on behalf of the plaintiff in ejectment, who relies upon the deed, to prove its execution. He has a disqualifying interest in the result of the suit.

2. In such a case, the grantor would not be called against his interest; it would be to his interest to maintain the title which he had covenanted to make good.

3. Such a grantor is, for the same reason, incompetent to prove that he gave notice to a subsequent purchaser that he had already sold and conveyed the land to another person.

4. COVENANTS FOR TITLE—*where title is defeated by one subsequently accruing.* Where a party has conveyed land by deed with covenants for title, his liability upon his covenants will not necessarily cease to exist upon the failure of the title resulting from one subsequently accruing. Such would, no doubt, be the case, if the title failed from the acts or admissions of the grantee or other parties; but it could not be so where the title has failed by the action of the grantor himself, as in a subsequent sale and conveyance of land whereby the title under a prior unrecorded deed would be defeated.

5. QUIT CLAIM DEEDS—*what will pass thereby.* While a quit claim deed is as effectual to pass title as a deed of bargain and sale, still, like all other contracts, it must be expounded and enforced according to the intention of the par-

ties, so as to pass only such land as would be properly embraced in the language used.

6. SAME—*as to prior unrecorded deeds.* If the words used in the quit claim deed indicate an intention on the part of the grantor to pass only such
[*474] land as he owns at the time of its execution, the lands embraced in a prior valid deed will be held to be reserved from its operation, and will not pass thereby, although the prior deed remains unrecorded.

7. SAME—*application of the rule in this case.* In this case, the words used to describe the property intended to be conveyed by the quit claim deed were as follows: "All lots, blocks, land and fractional blocks, or any interest therein, in the town of Pekin, that I have; also all my right and interest, or in anywise appertaining, together with the right of ways. This deed is intended to convey all the interest the said grantor has in the town of Pekin." *Held*, that this language only embraced such land as the grantor owned at the time of the execution of the deed, and would not affect the title under a prior valid conveyance, although such prior conveyance remained unrecorded.

8. SAME—*as regards a prior deed which is void or voidable.* But a prior deed which is void or even voidable is not regarded as embraced in such a reservation in a subsequent quit claim deed; and the subsequent deed will, in such case, be upheld, as binding and sufficient to pass the title as against the prior conveyance.

9. SAME—*as against a prior deed which is imperfectly acknowledged, and cannot be proven.* Or where the prior deed is so insufficiently executed, as regards the certificate of acknowledgement, that its execution cannot be proven thereby, and its execution cannot be otherwise proven so that it can be admitted in evidence as a conveyance, it cannot be held to constitute a conveyance, and so will not control the operation of a subsequent quit claim deed which was designed to pass all the lands owned by the grantor at the time of its execution.

WRIT OF ERROR to the Circuit Court of Tazewell county; the Hon. JAMES HARRIOTT, Judge, presiding.

This was an action of ejectment brought in the court below, by Mary M. Doolittle and Irwin B. Doolittle, minors, who sue by their next friend, Jesse A. Nason, against John J. Hamilton, for the recovery of lots eleven and twelve, in block seventy-six, in the city of Pekin.

The plaintiffs claim as children and heirs at law of Irwin B. Doolittle, deceased, who was the grantee of Peter Menard, by deed, with covenant of warranty, bearing date on the 22d of June, 1844, and recorded September 22d, 1858, for the lots in controversy. This deed purported to have been acknowledged before a notary public, but on account of there being no proper seal attached to his certificate, other proof of its execution was
required. The plaintiffs then introduced the grantor as a
[*475] witness to prove the execution of the deed, and he was permitted to testify against the objection of the defendant, who excepted.

The defendant claimed to derive title, as a remote grantee, under a quit claim deed executed by the said Peter Menard to Samuel P. Bailey, on the first of September, 1858, and recorded on the day following. The words used in this deed to show what lots, etc., were intended to be conveyed thereby, are as follows:

"all lots, blocks, land and fractional blocks, or any interest therein, in the town of Pekin, county of Tazewell, and State of Illinois, that I have; also all my right and interest, or in anywise appertaining, together with the right of ways. This deed is intended to convey all the interest the said Peter Menard has in the town of Pekin, now city, in said county."

The defendant having introduced in evidence the remaining deeds constituting his chain of title, rested his case.

Plaintiffs then recalled Peter Menard, to whose testimony defendant objected, because of his interest in the result of the suit, being warrantor and general covenantor in the deed through which plaintiffs claimed. Objections overruled, and Menard testified, that when he made the deed to Bailey, read by defendant, he told Bailey he had not an inch of land in Pekin; that his last remaining interest he sold to W. D. Briggs, and did not think he had anything left in Pekin, which had not been sold and deeded away. Bailey then said: the deed to Briggs did not cover anything he wanted; that Briggs' deed only related to *undivided* lots; he wanted a release of my interest in the *divided* lots. I replied I did not have any interest in these lots to release. But Bailey persuaded me, and I told him if he was willing to give something for nothing, and would make a deed to one Pearl of a lot I had originally sold to him in Wesley City, and to which lot Bailey made some claim, and wait till I could go to Pekin and look into the matter, I would give him the deed, if all was right. Bailey said he would make the deed to Pearl, but was unwilling to wait for me to go to Pekin. I at length yielded, [*476] and made Bailey the deed, and he gave me a bond to make the deed to Pearl of the lot in Wesley City. That lot might perhaps sell, with good title, for $8 or $10, and could not have been worth more than $50. I did not value my interest in Pekin at anything, and did not believe I had any there when I made Bailey the deed.

The defendant introduced counter evidence upon this point, and the cause was submitted to the jury.

The trial resulted in a verdict for the plaintiffs. A motion for a new trial was overruled, and judgment entered upon the verdict. The defendant thereupon sued out this writ of error.

Two questions arise under the assignment of errors:

1. As to the competency of Peter Menard, the grantor in the deed to Doolittle, as witness to prove its execution, and to prove notice to his subsequent grantee.

2. As to the effect of the subsequent quit claim deed to Bailey, as against those claiming title under the prior unrecorded deed.

Mr. B. S. PRETTYMAN for the plaintiff in error:

1. Menard was not a competent witness for his grantee to prove the execution of the deed, because it contained covenants for title which would create an interest in him to maintain the title under it. Only those who convey by quit claim, or without warranty, are permitted to testify for the grantee when the title of the property is in controversy. *Cain* v. *Henderson*, 2 Bin. R., 108; *Dornick* v. *Remelech*, 10 Serg. & Rawle, 84; 3 Watts, 487; see also 1 Greenlf. Ev., p. 397.

In this case, the controversy relates to the title of the property in dispute. The title is warranted by the witness to the plaintiffs' ancestor, who call him to support his covenants. But it is contended that his liability is alike in both cases, as he [*477] would be liable to Bailey or his assigns; but this is assumed, and not true in fact. The consideration in one deed is over $1,000 and warranty, in the other only $200 and quit claim.

But the case is like a controversy by two tenants from the same landlord contesting for the possession of the land, by virtue of leases from the same lessor; and when two tenants contest for possession of the same land, the lessor is not a competent witness. 2 Stark. Ev., 541.

But Menard is called to show that when he sold and conveyed to Bailey, he had no title then to sell and convey in the premises described in the deed; yet, after making a deed, a grantor is estopped from saying he had no title to the thing granted, (1 Stark. Ev., 302;) and a grantor is generally estopped from denying that he had title to the thing sold and conveyed. 1 Greenlf. Ev., 24.

The declarations of a grantor, made after a grant, are not admissible against a grantee or those holding under him, to prejudice their rights under the grant. *Simpkins* v. *Rodgers*, 15 Ill., 398.

During the life-time of a grantor in an unrecorded deed, the apparent title is in him; and he who purchases that apparent title in good faith, it is considered on all hands, is protected by the statute. *Kennedy* v. *Northup*, 15 Ill., 157.

But it is insisted that Bailey is not a purchaser in good faith, and that his purchase was in fraud of the rights of plaintiffs below; yet there is no evidence tending to show a want of good faith except the testimony of Menard alone, which was improperly received, on account of his interest, and also because he was at the time estopped by law; and it is also wholly contradicted by the testimony of Bailey, a witness competent for defendant, having been fully released before testifying; and in order to

defeat a subsequent purchase for fraud, it must be proved positively, and cannot be presumed. This court, in the case of *Rogers* v. *Wiley*, 14 Ill., 65, held, that to take a case out of the registry act, so as to defeat the title of a subsequent purchaser who first places his deed on record, on the ground [*478] that he had actual notice of a prior unrecorded deed of the same premises, the proof of such notice must be clear and positive, so as to leave no reasonable doubt that the taking of the second deed was in bad faith towards the first purchaser; and the same doctrine is laid down by the court in the case of *Doyle* v. *Teas*, 4 Scam., 244, where the court say that nothing short of actual fraud shall supersede a conveyance actually recorded; and it is only by possession or actual notice clearly proved, that a registered conveyance can be postponed; and similar is the principle laid down in the case of *Jackson* v. *Von Valkenberg*, 8 Cowen, 260.

Messrs. COOPER & MOSS for the defendants in error:

The sole objection taken to the deed from Menard to Doolittle was as to the proof of its execution. Being acknowledged before a notary, and attested only by his private seal, Menard himself was called, who proved he made the deed at the time it bore date. He was a competent witness for this purpose, being no party to the record, and his testimony being *against*, and not *for* his interest; as the effect of establishing said deed, is to hold him on his covenants of warranty and for title, contained in it.

Menard having *specially* and *by numbers*, conveyed said lots to said Doolittle, in December, 1844, his deed of September 1, 1858, to Bailey, passed no title and was improperly admitted in evidence. Judged by its terms, this latter deed was not intended to convey any property or interest which Menard had before sold and deeded away, and falls clearly within the rule laid down in *Brown* v. *Jackson*, 3 Wheat., 448, and affirmed by this court in *McConnell* v. *Reed*, 4 Scam., 121–2, and *Butterfield* v. *Smith*, 11 Ill., 485.

It is a mere release, *general* and not *specific* in form, of "all my right, title, interest and claim, both in law and equity, in and to all lots, blocks, lands and fractional blocks, or [*479] any interest therein, in the town of Pekin," etc., "*that I have*," and "this deed is intended to convey all the interest the said Peter Menard *has* in the town of Pekin, now city," etc. These are plainly words *in praesenti*, designed to designate and pass such right, title and interest only as the grantor *then owned*, and not anything which was *then* rightfully his to sell and convey.

But admitting this deed to be good to pass title to *bona fide* purchasers without notice, Bailey could not take under it. He

was not an innocent purchaser. This, Menard's testimony clearly shows.

It is contended, however, that Menard is an incompetent witness to impeach Bailey's title, because he thus relieves himself from liability on the covenants in his deed to Doolittle. The objection rests on a misconception of the binding force of those covenants. Having a clear title to the lots when he deeded to Doolittle, as the record admits; and having passed that title unimpaired in any way, to Doolittle, Menard did all he was or could be called on by those covenants to perform. It is only as against claims growing out of defects existing in the title, at the time, or prior to the making of the deed, and not to incumbrances, or claims arising from matters subsequent, that such covenants are of force.

That Menard intended to disturb in any way the Doolittle title, by his deed to Bailey, will not be contended; nor will it be presumed, in view of the form of the deed itself, and other facts developed in the case; and if injury resulted to the claimants under the Doolittle deed, it was from the fact that their deed was not recorded, for which Menard could not be held responsible.

MR. CHIEF JUSTICE WALKER delivered the opinion of the court:

This contest grows out of claims to the land in controversy, based upon two conveyances made by the same vendor, at [*480] different times to different persons. Menard, in 1844, conveyed the lots to Doolittle, the father of defendants in error. This deed was, however, not recorded until the 22d day of September, 1858. He again sold the land to Bailey on the 1st day of September, 1858, and this latter deed was recorded on the following day. Bailey conveyed the premises to Milner on the 23d day of October, 1858, and the deed was recorded on the same day. Milner sold to Prettyman by deed dated the 1st day of February, 1859, which was recorded on the 7th day of that month. Prettyman sold the premises to Priddy by deed of the date of the 17th of May, 1859, which was recorded on the 26th of that month. Priddy conveyed to plaintiff in error on the 6th of November, 1860, and his deed was recorded on the 7th day of the following December.

Defendants in error on the trial below offered in evidence the deed from Menard to their father; but it was rejected for the want of a seal to the certificate of acknowledgment of the notary public before whom it was attempted to be executed. To prove its execution, Menard, the grantor, was called as a witness. It was objected that he was incompetent as a witness because the deed contained covenants of warranty, but the court, against

objection, admitted him and allowed him to testify, which is now assigned as error. We are aware of no case which has gone the length of permitting the grantor by deed containing covenants for title to give evidence in a case in which the validity of the title is involved. Such a person has, it is believed, always been held to have a disqualifying interest in the event of the suit.

It is insisted in this case, that the witness is called against his interest. That it was his interest to invalidate the deed, and thereby avoid his covenants. This is not the true attitude of the grantor. It is obviously his interest to maintain the title which he covenanted to make good. Nor does it follow, that to defeat a recovery under the deed would absolve him from liability on his covenants. A failure to recover would fix the failure of title, which he could not dispute. And it would afford a material link in the chain of evidence to establish his lia- [*481] bility. Nor could he in an action of covenant on the deed establish the deed to have been void, by showing that the land could not be recovered under this deed. And where it is shown that no title passed by the execution and delivery of the deed, then the liability is established under his covenants. It does not follow, that because the deed was not sufficiently proved to bind third parties, that it therefore was not binding between the parties to the instrument. As between them, and as a covenant, it might be proved as any other written instrument, to entitle it to be read in evidence. In an action of covenant it would require a less degree of proof, than as a deed sufficient to pass title to land. Thus it will be seen that to defeat a recovery under the deed would not defeat the right of recovery on it as a covenant.

It was also urged that the court erred in permitting Menard to testify that he gave Bailey notice at the time he executed the quit claim deed to him, that he had sold all the lands he had formerly owned in Pekin, and had no property at that time in the city. The object of this evidence was to defeat the title of plaintiff in error, by showing that he had notice at the time he purchased. He was incompetent to prove this fact to the same extent and for the same reasons that he could not prove the execution of his deed to Doolittle. We, therefore, deem the further discussion of this question unnecessary.

It is again urged that Menard was not liable on his covenants, because it appears that he had title at the time he entered into them. And that he could not become liable for a failure of title subsequently accruing. This would no doubt be true, if the title failed from the acts or omissions of the grantee or other parties; but it cannot surely be true, when the title has failed by the action of the grantor himself. He covenanted that he would forever warrant and defend the title against all claims and persons whom-

soever. Now this must embrace any claim which he
[*482] might assert, or might transfer to any other person, by the assertion of which the title should be defeated. The operation of a covenant of this character surely cannot be so narrow, that because the grantor had title when the conveyance was made, that he may, in fraud of his covenant, wrongfully convey the property so as to defeat the title he had covenanted to defend. Nor could he with impunity defeat the title of the grantee and escape liability on his covenants, by disseizen or other wrongful or voluntary act. It can never be held, that after entering into such a covenant, that he may, in fraud of the rights of his grantee, defeat the title and escape liability on his covenants. The neglect of his grantee to record his deed does not authorize him to sell land which he has already conveyed, and for which he has received the pay, and obtain money therefor a second time. This would be too monstrous for a court to sanction.

It is likewise insisted that the terms of Menard's quit claim deed to Bailey do not embrace the lots in controversy. The language employed is this: "All lots, blocks, land and fractional blocks, or any interest therein, in the town of Pekin, county of Tazewell, and State of Illinois, that I have; also all my right and interest, or in anywise appertaining, together with the right of ways. This deed is intended to convey all the interest the said Peter Menard has in the town of Pekin, now city, in said county." The language used clearly manifests the intention of the grantor, to limit the operation of the conveyance to such lands as he then owned, and the title to which was still in him. Whilst a quit claim deed is as effectual to pass title as a deed of bargain and sale, still, it, like all other contracts and agreements, must be expounded and enforced according to the intention of the parties. In this deed, the intention of Menard appears to have been to sell such lands only as had not been conveyed by him to other parties previous to that time.

In the cases of *Brown* v. *Jackson*, 3 Wheat, 449, *McConnell* v. *Reed*, 4 Scam., 117, and *Butterfield* v. *Smith*, 11 Ill., 485, it
[*483] was held that quit claim deeds, in which similar language was used, did not operate to pass the title as against prior unrecorded deeds. That the deed limited the operation of the conveyance to land the grantor owned and had not previously conveyed, and that the grantee took the deed subject to the reservation and was bound by its terms.

The question then presents itself, whether Menard's insufficiently executed deed is embraced in the reservation. By fair construction, the language must be restricted to previous conveyances, legally executed, and operative as such. A conveyance

void under the law, or even voidable, at the time of executing the subsequent conveyance could not be held to be embraced within the reservation. It not unfrequently happens, that the subsequent deed is designed to avoid a prior deed which the grantor has the legal right to avoid, and such conveyances are upheld as binding, and sufficient to pass the title. Again, the language should be restricted so as not to embrace any conveyance which is so imperfectly executed that the law will refuse to give it effect as a conveyance of title. If it has been so executed that it cannot be proved so as to be admitted in evidence as a conveyance, it cannot have effect, and cannot be held to constitute a conveyance. If for want of proof, or from other defect, it cannot be used in the assertion of the right to hold the title, it cannot be said to be a conveyance of the title to the land. In such a case, the legal title does not pass from the vendor, but remains in him at the time the subsequent conveyance is made, and falls fully within the operation of the language of such a deed. Holding the legal title at the time, it must be conveyed by the language —"This deed is intended to convey all the interest the said Peter Menard has in the town of Pekin." Owning the legal title at the time, it was an interest that passed by the conveyance to Bailey.

This view of the case renders it unnecessary to discuss the question of notice at this time. Until defendants in error shall establish a title by a legal conveyance, they are not in a position to call upon plaintiff in error to produce any evidence of title. The first step they were bound to take to authorize [*484] a recovery was to show that Menard's title had passed to and vested in them. If unable to show that they have a remedy at law, they must, if they have any rights, be left to assert them in a court of equity, where the question of notice as well as all other equitable questions would be considered.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

ILLINOIS CENTRAL RAILROAD COMPANY
v.
GEORGE D. READ.

1. FREE RAILROAD PASSES—*to what extent railroad companies may, by special contract, be exempted from liability for injuries to passengers.* A passenger, while traveling in the cars of a railroad, received injuries to his person, occasioned by a collision of trains. At the time of the accident, the passenger was traveling under a free pass given him by the company, upon the back of which was this printed endorsement: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that this company shall not be liable, under any circumstances, whether of negligence of their agents, or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using the ticket." In an action on the case against the company, to recover damages for the injuries thus received by the passenger, it was *held*, that this agreement did not exempt the company from liability for the gross negligence of its employees, but it did exempt it from liability for any other species or degree of negligence not denominated gross, or which might have the character of recklessness. For such unavoidable accidents, as will happen to the best managed railroad trains, this agreement would be a perfect immunity to the company.

2. Railroad companies have a right to restrict their liability as common carriers, by such contracts as may be agreed upon specially, the companies still remaining liable for gross negligence or willful misfeasance, against which good morals and public policy forbid they should be permitted to stipulate.

3. CONTRACT—NOTICE—*which of these the endorsement constitutes.* The endorsement upon the back of this pass was not a mere notice, like the one in *Newhall's* case, 24 Ill., 466; the free ticket was a gratuity, and the ac-
[*485] ceptance and use of it established the endorsement thereon as an agreement between the party giving and the party receiving. By using the ticket, the passenger assents to the terms on which it was given, and it becomes, to all intents and purposes, an agreement.

4. CORPORATIONS—*to what extent liable for the acts of their employees.* All corporations act by and through their agents, for whose acts, in the line of their business, the corporation appointing them is held liable. A corporation will be held responsible for the unlawful acts of its employees or agents, which include willful injuries, or injuries resulting from gross negligence.

5. The distinction attempted to be made by the New York courts, between the negligence of the corporation, acting through its president and board of directors, and the negligence of their employees or servants and agents, is not recognized in this State.

6. PLEA OF RELEASE—*its requisites.* It is not necessary, in pleading a release, that it should be averred it was under seal. A release, *ex vi termini*, imports a seal: and it is a matter of evidence, whether it have a seal or not, if a seal be necessary.

7. SEAL—*not necessary to a release.* But it has been held that a release of a debt secured by mortgage need not be under seal, *a fortiori*, it need not be when prospective damages are released, as in this case.

8. PLEADING—*plea to the whole declaration—its requisites.* In an action on the case to recover damages resulting from the negligence of the defendant, three of the counts in the declaration averred gross negligence, while another count averred negligence only. A plea to the whole declaration was held bad on demurrer, because it did not answer the charge of gross negligence.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action on the case brought in the court below

against the appellant to recover damages for an injury to the person of the appellee, alleged to have been received by him whilst riding on the cars and over the road of the appellant. The several counts of the declaration are in the usual form, in actions for personal injury by a passenger against a common carrier, alleging negligence and carelessness on the part of the appellant, its agents and servants, and three of the counts charging the negligence to have been *gross*.

To this declaration the appellant pleaded the general issue, and four special pleas. The second plea alleges, that, prior to the injury, the appellant, at the special instance and [*486] request of the appellee, and without any consideration therefor, other than the agreement of the appellee thereinafter mentioned, issued and delivered to the appellee a *free ticket* or *pass*, entitling him, for a certain time, to ride on the cars and over the road of appellant without paying any compensation therefor. That the appellee, in consideration thereof, assumed all risks of accidents, and expressly agreed that the appellant should not be liable, under any circumstances, whether of negligence of its agents or otherwise, for any injury to the person, or any loss or injury to the property of the appellee, whilst he, as a passenger, should be using said ticket. That at the time of the alleged injury, the appellee was riding on the cars of the appellant, without paying any consideration therefor, under and by virtue of said ticket, and using said ticket for that purpose; and that the injury to the appellee, if any, occurred without any fraud or misconduct on the part of the appellant or any of its directors.

The third plea, after setting out the issuing and delivery to the appellee of the free ticket or pass, substantially as in the second plea, alleges that there was endorsed upon said ticket an agreement as follows: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that this company shall not be liable, under any circumstances, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket." That the appellee accepted said ticket subject to and upon the said agreement, and thereby became and was bound by the terms and conditions thereof; that at the time of the injury, appellee was using the ticket as a passenger, and riding upon the cars of the appellant by virtue of said ticket, without paying any compensation therefor; and that the injury, if any, happened without the fault of the appellant or any of its directors.

The fourth plea is substantially like the second, alleging, however, in conclusion, that the negligence, if any, which occa-

[*487] sioned the injury complained of, was the negligence of the agents and employees of appellant, *solely*.

The fifth plea alleges, that after the committing of the several supposed grievances in the said declaration mentioned, the appellee, for a valuable consideration, released and discharged the appellant from any and all liability by reason of the same.

To the second, third and fourth pleas, a general demurrer was filled by appellee, and to the fifth plea the appellee demurred specially, assigning for cause, "that it does not appear, by said fifth plea, that the said supposed release or discharge was, or is under seal." The court sustained the demurrers, and the appellant elected to stand by its pleas.

The cause then came on to be tried before a jury upon the issue formed upon the first plea.

The evidence on the part of the appellee, as presented in the bill of exceptions, shows that the injury complained of, consisted of a scalding of his right hand. That it occurred at or near Clinton, in De Witt county, before daylight of January 8, 1862. That the morning was very dark and foggy, and the railroad track very slippery; and that the occasion of the injury was the running of the engine of a freight train into the car in which the appellee was riding. The appellee having rested, appellant offered to prove by witnesses in court, and sworn, the facts set forth in the special pleas, and each of them. Appellee objected to the introduction of such evidence, and the court sustained the objection, and refused to allow said facts, or any of them, to be proved to the jury; and the appellant excepted.

Upon the conclusion of the evidence, the court instructed the jury on behalf of the appellee, the plaintiff below, as follows:

1. The jury, in assessing damages in this action, may take into consideration, not only the loss, expense and injury arising from the injuries received at the time of the accident, as well [*488] as the bodily pain and mental suffering of the plaintiff; but also the prospective loss and damage, if any, arising from any disability resulting to plaintiff, which renders him less capable of attending to his business than he would have been if the injury had not been received.

2. The jury, in assessing the damages in action, may take into consideration, not only the bodily disability occasioned by the accident, but also any impairment of his intellectual faculties and general health, if any, which they are satisfied, from the evidence, will affect or impair his future ability to attend to his business the same as if the injury, complained of, had not been received.

3. If the jury believe, from the evidence in this case, that plaintiff, while traveling on defendant's road, received through

the agency of said defendant, any injury to health, life or limb, the result of gross negligence, then he is entitled to recover such damages as will recompense to him the loss, or losses, he may have sustained, as the result of such injury or injuries.

4. If the jury believe, from the evidence, that the defendant has been injured in health of body or mind, or in his limbs, so that his ability to labor and attend to his affairs, and generally pursue the course of life he might otherwise have done, as well since as before the accident, and such injuries were inflicted upon him through the gross negligence of defendant, while being carried as a passenger upon the road, the jury may assess such damages, present and prospective, as will recompense to him all the losses he may have sustained as a result of such injuries.

5. In estimating the plaintiff's damages, it is proper for the jury to estimate the effect of the injury in future upon the plaintiff's health, if any, the use of his hand, and his ability to attend to his affairs generally in pursuing his course of life, and the bodily pain and suffering; the necessary expenses of medical care and loss of time, and all damages, present and prospective, which can be treated as a necessary result to the injury inflicted by the collision upon the plaintiff in this action.

To all of which instructions, and the giving of the same, [*489] and each of them, by the court, the defendant, by its counsel, excepted.

At the instance of defendant's counsel, the court gave this instruction to the jury:

The jury are instructed that, in estimating the damages in this case, the jury are not authorized to award vindictive or exemplary damages, although the jury may believe, from the evidence, that the agents of the defendant were guilty of negligence which caused the injury complained of.

The jury returned a verdict for the plaintiff for the sum of $4,000, a new trial was moved for and denied, appellant excepting, and judgment was entered upon the verdict.

The errors assigned upon the record question the correctness of the rulings and decisions of the court below: 1st, in sustaining the demurrers to complainant's special pleas; 2d, in refusing to permit evidence to be given to the jury tending to establish the facts set up in said pleas; and 3d, in overruling the appellant's motion for a new trial. And in all and each of these several rulings, the appellant insists that the Circuit Court erred; and the points made on behalf of the appellant may be stated as follows:

First. That the second, third and fourth pleas, and each of them, set up an agreement between the parties, which, if com-

petent to be entered into by them, fixes and determines their rights and liabilities in this action.

Second. That it was competent for the parties to make said agreement, and when made, it was valid and binding; and that by its terms the appellant was relieved from all liability for the injuries complained of.

Third. That the fifth plea is good in law, it not being necessary to the validity of a release, that it should be under seal, and therefore not necessary that it should be so pleaded.

Fourth. That the court below gave improper instructions to the jury, at the instance of the appellee.

[*490] Messrs. MCALLISTER, JEWETT & JACKSON, for the appellant.

1. Chitty defines a contract or agreement, not under seal, to be "a mutual assent of two or more persons, competent to contract, founded upon a sufficient and legal motive, inducement or consideration, to perform some legal act, or omit to do anything, the performance whereof is not enjoined by law." Blackstone defines a contract to be "an agreement, upon sufficient consideration, to do, or not to do, a particular thing." Tested by either of these definitions, it is insisted that the agreement set up in the second, third and fourth pleas contains all the elements of a valid contract. There are the competent parties, assenting; the sufficient and legal motive, inducement or consideration, to wit: the free carriage of the appellee, and the thing to be done by the appellee, to wit: the assumption of the risks of injury from the negligence of the agents and servants of appellant, and his agreement that the appellant should not be liable therefor. The form of the contract, as stated in the third plea, is also such substantially as prevails, and has been held valid, in the business of common carriers, or in bills of lading and special receipts. So that, independent of the authorities hereafter cited, which pronounce such contracts complete and valid, it is insisted that the definition of a valid contract or agreement, in respect to the component parts thereof, is fully met and answered by the statements of these pleas.

2. It was competent for the parties to make the agreement, exempting the company from liability for any and all negligence, of whatever degree. *Welles* v. *New York Central Railroad Co.*, 26 Barb., 641; *Smith, adm'r*, v. *New York Central Railroad Co.*, 29 Id., 132; *Bissell* v. *New York Central Railroad Co.*, Id., 602; *Perkins* v. *New York Central Railroad Co.*, 24 N. Y. Rep., 196. In this last case, the principles and reasoning applicable to the case at bar, are well stated in the opinion of E. D. SMITH, J., concurred in by Ch. J. SELDEN and J. DENIO, DAVIS,

ALLEN and GOULD. At page 204, he says: "The defendants are transporting persons and passengers by the power- [*491] ful agency of steam, and when accidents occur, they are liable to be attended, more or less, with serious consequences. This the parties both well knew, and they also well knew, that railroad accidents were of frequent occurrence; that railroad travel was subject constantly to perils resulting from the carelessness and negligence of engineers, conductors, etc.; that trains are frequently thrown off the track, or come in collisions, etc., and that all such accidents involve, unavoidably, more or less loss of life, or limb, or bodily injury, and other disastrous consequences. With perfect knowledge of these facts, Mr. Perkins asked for and accepted the free pass upon the express condition that he should assume all risk of accidents. And expressly agreed that the company should not be liable under any circumstances, whether by the negligence of the defendant's agents or otherwise, for injury to the person, etc. Such is the bargain. It can mean nothing else, than that Perkins will take for himself the risk of all accidents and injuries to his person, attending his contemplated trip, in the defendant's cars, from Rochester to Albany, so far as such accidents and injuries might result from the negligence of the defendant's agents and servants." And further on, at page 205: "Without an agreement, exempting and absolving them from all liability in respect to such accidents, and the injuries resulting therefrom, the defendants would be legally responsible for such injuries. Mr. Perkins assumes the risk for himself for such injuries. He becomes his own insurer. He absolves the defendants, in advance, from all liability for any injury to his person from such negligence. It was a fair insurable risk, and Perkins agreed to assume it for himself." Upon this reasoning, the judgment of the Supreme Court, in favor of the plaintiff, was reversed.

The case of *Wells* v. *New York Central Railroad Co.*, above cited, from 26 Barbour, was carried to the Court of Appeals, and is again reported in 24 New York Reports, 181, and the judgment of the Supreme court, in favor of the defendant, affirmed. The opinion of the court, concurred in by Justices DENIO, DAVIS, ALLEN and SMITH, was delivered [*492] by GOULD, J., and remarking that some question was made, whether the endorsement on the ticket is a contract, he says, (page 183,) "It seems necessary to say, that the word '*agreed*,' means the concurrence of two parties, and that the act of acceptance binds the acceptors as fully as his hand and seal would." And then, referring to Co. Litt., sec. 217, note, 5 Hill., 258–9, 1 Seld., 229, 27 Barb., 130, he adds: "The point is too well settled to admit of debate." And at page 184, he says: "As to the construction of the contract, it would seem, from what has

been said, that the term *gross negligence*, as used in the law, has a technical meaning, which is not properly applicable to those acts of servants of a corporation, for which the corporation is responsible, though as between their acts, which are slightly negligent, and those which are very negligent, there is no very different rule of responsibility. It is the fact of negligence, (mere negligence,) and not its degree, which incurs the liability.

"This being so, and taking the terms of this contract—'the company shall not be liable, under any circumstance, whether of negligence of their agents or otherwise, for any injury, etc., of the passenger using this ticket'—against what liability does it contend? We are not to give it a construction that would make it illegal, unless that be the only fair construction; and its plain purport provides against 'circumstances of negligence,' the words '*or otherwise*,' being too vague to be held to bear any meaning. It is, then, a contract not to be liable for the mere negligence of the agents of the company." And at page 185, "Upon the reasoning above, and upon any legal principle, whether founded upon public policy or otherwise, *there seems to be nothing illegal in such a contract.* It cannot reasonably be said, that because five or ten persons, on a train that contains two hundred, have such passes, there is the less inducement to care on the part of the company or its agents, or that a feeling of indifference to human life would be thereby caused. The *quantum* of [*493] interest, the ratio of motive, is too utterly insignificant, when compared with the vast liability not protected by any contract, and binding the company and its agents to every measure of caution. That agents will be careless, we have frequent and terrible proof. But the holding of such contracts illegal would not even tend to alter the fact."

The case of *Smith, adm'r*, v. *New York Central Railroad Co.*, above cited from 29 Barbour, was taken to the Court of Appeals, and is again reported in 24 N. Y. Rep., 222.

It was an action brought under the statute of 1847, for the negligent killing of one Ward, and it appears from the statement of the case, that Ward had a lot of hogs to ship from Buffalo to Albany, and contracted with the defendant for two cars for that purpose. The contract set forth that the hogs were carried at a reduced price in consequence of the owner's assuming certain risks in respect to their safety, etc. It also contained this clause: "And it is further agreed, that the persons riding free to take charge of this stock, do so at their own risk of personal injury from whatever cause." Ward went on the train in charge of the hogs, and paid nothing additional therefor. He was also furnished with what is called a drover's ticket, passing him free over defendant's road. The judgment of the Supreme Court, in

favor of the plaintiff was affirmed, but without in any manner overriding or interfering with the opinions and reasonings in the cases of Welles and Perkins, above cited. WRIGHT, J., who delivered the principal opinion, in favor of affirmance, after reciting the facts, says, at page 227, "In no just sense could these persons be regarded as gratuitous passengers; and although the carriers assume to treat them as riding free, they were not, as it was a condition of the contract that they were to ride with the train to take care of the stock, and the consideration paid to the defendant was as well for such passage as for the carriage of the property itself." And further on, at page 228—"The accident resulted (as the jury must have found) from the use, by the defendant, of an *unsafe and dangerous car*, with a flattened wheel, which caused it to leave the track. Pro- [*494] viding and using such a vehicle was the negligence of the carriers, culpable and inexcusable. It is, therefore, quite unnecessary to inquire whether there is really anything practical in the definition of the degrees of negligence heretofore attempted by courts and text writers, or whether the carriers, being a corporation, may contract against liability for the negligence of its employees and servants." The opinion of Justice WRIGHT turns, then upon two points: 1st, That Ward was not a gratuitous passenger. 2d, That the negligence which occasioned the injury was the negligence of the company itself. At page 236, it is stated, that "DENIO and DAVIS, Js., were of opinion that there is no general public policy forbidding a contract by which a railroad corporation should be exempt from liability for the negligence of its agents in respect to a purely gratuitous passenger; but they thought that the railroad act and its policy prohibit a contract for such exemption with a paying passenger. They were for affirmance, on the ground that the plaintiff's intestate was not a gratuitous passenger.

SMITH, J., was for affirmance, on the ground that "the negligence was that of the corporation itself." And SOUTHERLAND, J., for the reason that, "in his opinion, the contract of exemption was void, irrespective of whether the transportation was gratuitous or for hire."

Justice ALLEN, in a very able, dissenting opinion, concurred in by Ch. J. SELDON, and GOULD, J., insists that this case falls within the principle of the case of *Perkins* v. *New York Central Railroad Co.*, and that the judgement therefore should be reversed. And in that opinion, at page 236, he says: "It is enough that a special contract is made upon a consideration, which the parties have agreed to be adequate. Most certainly the courts will not, in an action upon a policy of insurance, inquire into the sufficiency or adequacy of the premium, as a consideration

for the risks assumed. The deceased here agreed in consideration that the defendant would take his stock at a given rate for transportation, and permit him to ride over the road without additional charge, to take charge of the stock, that he would assume and bear all the risks of the journey; and who shall sit in judgment upon this contract, and say it was without consideration, or that the consideration was unlawful, or that the contract was against public policy? As said before, the decision in *Perkins* v. *New York Central Railroad Co.* is decisive of this case."

[*495]

Thus it appears that six of the eight judges composing the New York Court of Appeals, expressed opinions that fully sustained the defense set up in the second, third and fourth pleas in the case at bar, although the judgment in that case was affirmed upon grounds, and for reasons, not applicable here; and only one of said judges held that such a contract was invalid.

The same question, under nearly identical circumstances, came before the New York Court of Appeals in the case of *Bissell* v. *New York Central Railroad Co.*, above referred to, and is reported in 25 N. Y. Rep., 442. It seems that Bissell, plaintiff's intestate, was a cattle shipper, and signed a contract with defendant, similar to the one in the case of Smith, and received a free pass to enable him to accompany and take care of his stock, on the back of which was printed the following: "*Notice.*—The owner of stock receiving this ticket, assumes all risks of accidents, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents, or otherwise, for any injury to the person, or for any loss or injury to the stock," etc.

The judgment of the Supreme Court, in favor of the plaintiff, was reversed. The prevailing opinions were delivered by Justices GOULD, SELDEN and SMITH, and concurred in by Js. DAVIS and ALLEN, and, without quoting from their opinions, it may be sufficient to say, that they all regarded the case as falling within the principle and reasoning of the cases *Welles* and *Perkins* v. *New York Central Railroad Co.*, and therefore controlled by them. Ch. J. DENIO, in a separate opinion delivered by him, (page 455,) recognized and adhered to the doctrine of the Welles and Perkins cases, but dissented from the majority of the court in this particular case, upon the distinction taken by him in the case of Smith; and holding, that, under the particular facts of this case, Bissell was not a *gratuitous passenger*.

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We claim it as a clear result from each of the cases above referred to, that with a gratuitous passenger, it is competent for a railroad company to enter into a contract for exemption from liability for injuries resulting to such passenger from the negligence

of the company's agents and servants, and that such a contract with such a passenger is valid, lawful, and not against public policy, and is a good defense to an action to recover damages in consequence of such injuries. The second, third and fourth pleas each allege that the appellee was a gratuitous passenger; that he entered into a contract, exempting the appellant from liabilities for such injuries; and they further state, in substance, and the proof shows that the injuries to the appellee were the consequence of the negligence of the agents and servants of appellant, and not of the corporation itself, or any of its principal or managing officers — and from the same cases, it appears, (and it would be apparent even without an authority upon the point,) that in such a case, the distinction sometimes attempted to be established between different degrees of negligence, can have no influence in determining the appellant's liability.

The cases above cited are, we think, the only ones in which the precise questions made on this record have been decided, and we desire it distinctly understood, that we rest this part of the appellant's case upon the *express agreement* of the parties, as set up in the pleas, and offered to be proved on the trial, and not upon the mere fact of gratuitous carriage — the gratuitous carriage being only the consideration for the agreement which is urged as a full defense.

3. We submit the question raised by the demurrer to the fifth plea, by referring simply to the case of *Benjamin* v. *McConnell et al.*, 4 Gilman, 536, in which Justice PURPLE, who delivered the opinion of the court, at page 545 says: "Where a con- [*497] sideration is expressed in a release, or otherwise proved to have passed between the parties, it is, in the opinion of the court, totally immaterial, whether the instrument is sealed or otherwise." And further on, "I have not been able to find one authority, that a release not under seal, when made for a good or valuable consideration, is not of binding force."

Mr. THOMAS HOYNE for the appellee:

The appellant, as a corporation, being a common carrier of passengers, according to law, cannot contract against its own gross negligence under any circumstances.

1. The law exacts from the carriers of passengers *extraordinary* care and diligence. *Caldwell* v. *Murphy*, 1 Duer, 241; *Ingalls* v. *Bills*, 9 Metc., 1; *Frink* v. *Potter*, 17 Ill., 406; *Galena and Chicago Railroad Co.* v. *Yarwood*, 17 Ill., 509; *Galena and Chicago Railroad Co.* v. *Fay*, 16 Ill., 558; *Tuller* v. *Talbot*, 23 Ill., 357; *Briggs* v. *Taylor*, 28 Vt., 180; *Hood* v. *N. H. Railway*, 22 Conn., 1; *Hall* v. *Connecticut Steamboat Co.*, 13 Conn., 319; *Boyce* v. *Anderson*, 2 Peters, 150; *Stokes* v.

Saltenstall 13 Peters, 181; 1 McLean, 540; 2 McLean, 157; *Stockton* v. *Fay*, 4 Gill, 406; *Hollister* v. *Norton*, 19 Wend., 236; *McElroy* v. *Nashua and Lowell Railroad Co.*, 4 Cush., 40.

2. Nor does it in any way change the liability of the carrier, that the passenger is carried *gratuitously* or without *payment of fare.*

It has been decided in two important cases by the United States Supreme Court, that it makes no difference whether a service is performed *gratuitously or not, in regard to the obligation to perform it well, after it is once entered upon. Derby* v. *Philadelphia and Reading Railroad Co.*, 14 How., 483; *Steamboat New World* v. *King*, 16 How., 469–474.

And our court has also, following the general current of authority, decided this question in 30 Ill., 23, the case of the *Ohio and Mississippi Railroad Co.* v. *Muhling*, in which Justice WALKER, delivering the opinion, says: "But even if they were [*498] carrying the passenger *gratuitously*, it could make no difference. When a person is on a train, under such circumstances, the only inquiry is, whether he was lawfully there, and not whether he had paid his money for the privilege."

But the appellants insist, notwithstanding the uniform current of authority in cases like this, that the payment of fare makes no difference in the liability assumed by the carrier, but still there is a difference between a *gratuitous assumption* of the risk and other cases. And the point is made, that a *gratuitous passenger* may contract so as to exempt the carrier from any liability on account of any negligence, however gross.

The farthest extension of the rule, even in cases of common carriers of property, has never gone beyond allowing them to restrict their liability by *special contract*, mutually agreed upon, but never exempting the carrier from his liability on account of *gross negligence.*

In the case of the *Illinois Central Railroad Co.* v. *Crabtree* and *Morrison*, 19 Ill., 136, Mr. Justice BREESE, delivering the opinion, expresses in terse and vigorous language, the true doctrine to be found in all the English and American cases. He says: "We think the rule a good one, as established in England and in this country, that railroad companies have a right to restrict their liability as common carriers by such contracts as may be agreed upon specially, they still remaining liable for *gross negligence*, against which public policy and good morals forbid that they should be permitted to stipulate." See 2 Ohio Rep., 131; 7 Hill, 292; 16 Penn. State Rep., 67; 4 Sandf., 136; 5 Sandf., 180; 6 How., 344.

The case at bar invokes all the authority and reasoning of these decisions. It is a case of *gross* negligence. The appellants were

sued for the tort committed, in case, and not in assumpsit upon the contract. The ground of the recovery below was the willful misconduct of defendants in destroying the usefulness and mutilating one of the limbs of the appellee. Their obligations to the passenger and the public have been violated in his person.

It is one of the cases where the law will not permit a con- [*499] tract to stand which gives impunity to so great a wrong.

The contract may be, however, specifically agreed upon; and yet, being against good morals and sound public policy, it will be treated as void: because the courts do not permit corporations as carriers of passengers, using the dangerous agency of steam, to stipulate for impunity against acts of negligence which endanger the safety of their passengers, and the lives of the citizens for whose convenience they have been incorporated and invested with their privileges.

In the case of *Sager* v. *The Portsmouth Railroad Co.*, 31 Maine R., 228, Chief Justice SHEPLEY says: "The very great danger to be anticipated by permitting railroad companies to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be over estimated. It would remove the principal safeguard for the preservation of life and property on such conveyances." And the agreement in that case was held no exemption to the company.

But, even did any doubt exist in regard to the void character of the attempt which has been made to stipulate against law for the exemption claimed by appellants in this case, I should insist upon the authority of all the cases, that the *printed endorsement* on the *back of the ticket or free pass* was only a *notice*, and not an express stipulation or contract by which Mr. Read was bound, because he traveled on the road and accepted the privilege tendered him.

This court has considered the question of *notice* in the case of common carriers, in the case of *The Western Transportation Co.* v. *Newhall*, 24 Ill., 468.

Justice BREESE, in that case, says: "That it is well settled in this country, that a common carrier cannot, by a general notice, even if brought home to the owner of the goods, limit, restrict, or avoid the liability imposed upon him by the common law. And that no distinction can be made between a public notice in the newspapers or by hand bills; and the *notice* conveyed by a receipt, *it being printed on the back of it*—for *wher-* [*500] *ever it may be found, it is but a notice.*"

The case at bar, then, being put upon the ground of *contract* by appellants, because a printed notice was on the back of the ticket used, comes clearly within the rulings of the case of Newhall. It can make no difference, as we have seen that it was a

free ticket. And on a ticket with the *fare paid*, the *endorsement*, as we have seen, could not be treated otherwise than a *notice*, and not as a *contract.*

Mr. Hoyne cited and commented upon the cases in New York which hold a different rule in regard to the main question, insisting that they are not sustained by reason or authority; and referred to the opinion of Mr. Justice WRIGHT, in the case of *Smith* v. *The New York Central Railroad Co.*, 24 N. Y., 223, as indicating a returning sense of reason and justice in the court of that State. Mr. Justice WRIGHT said: "Whether a carrier, to whose exclusive charge the safety of a passenger has been committed, by his own culpable negligence and misconduct, shall put in jeopardy the life of such passenger, is a question affecting the public, and not the party alone, who is being carried. It is said, the passenger should be left to make *whatever contract he pleases;* but, in my judgment, the public having an interest in his safety, he has no right to absolve a railroad company, to whom he commits his person, from the discharge of those duties which the law has enjoined upon it, in regard for the safety of man. Can a contract, therefore, which allows the carrier to omit all caution, or vigilance, and is, in effect, a license to be culpably negligent, to the extent of endangering the safety of the passenger, be sustained? I think not. Such a contract, it seems to me, manifestly conflicts with the settled policy of the State in regard to railroad carriage. Its effect, if sustained, would obviously enable the carrier to avoid the duties which the law enjoins in regard to the safety of men, encourage negligence and fraud, and take away the motive of self-interest on the part of such carrier, which is, perhaps, the only one adequate to secure the [*501] highest degree of caution and vigilance. A contract with these tendencies is, I think, contrary to public policy, *even when no fare is paid.*"

Mr. GEORGE C. CAMPBELL for the appellant, in reply:

The appellee does not make the distinction between the negligence of the defendant as a corporation, acting through its president and board of directors, and that of its subordinate agents.

This distinction is taken in all the cases bearing on this question.

As to the degree of care required from common carriers of passengers, I concur, substantially, with the learned counsel for the appellee.

By the common law, a common carrier is responsible to any passenger carried by him for all injuries to his person or property during the journey, resulting from "a want of that circumspection and diligence which is characteristic of cautious persons,

where the limbs, lives and health of human beings are at their control." Angell on Carriers, sec., 523; 2 Kent's Com., 600; *Camden and Amboy Railroad Co.* v. *Burke*, 13 Wend., 611; *Fuller* v. *Naugatuck Railroad Co.*, 21 Conn., 557; *Frank* v. *Potter*, 17 Ill., 509; *Galena and C. M. Railroad Co.* v. *Rae*. 18 Ill., 489; *Fuller et al.* v. *Talbot*, 23 Ill., 361; *Frank* v. *Scruger*, 18 Ill., 419; *Chicago, Burlington and Quincy Railroad Co.* v. *George*, 19 Ill., 517.

Railroads are common carriers and bound by the common law rules applicable to such character. They may, however, restrict their general liability by special contract, so as only to remain liable for gross negligence, fraud or willful misfeasance. *Illinois Central Railroad Co.* v. *Morrison*, 19 Ill., 139; *Western Transportation Co.* v. *Newhall*, 24 Ill., 468.

And this doctrine is abundantly sustained by authority. 2 Ohio State Rep., 131; *Shaw* v. *York and N. M. Railroad Co.*, 6 Eng. Rail. Ca., 87; *Austin* v. *Manchester and S. Railroad Co.*, 5 Eng L. and E., 329; *Same*, 11 Eng. L. and E., 506; *Carr* v. *L. and T. Railroad Co.*, 14 Eng. L. and E., 340; *Chapindale* v. *L. and T. Railroad Co.*, 7 Eng. L. and E., 395; *Morville* v. *Great Northern Railroad Co.*, 10 Eng. L. and E., 366; [*502] *Dorr* v. *Steam Navigation Co.*, 1 Kem., 491; *Steam Navigation Co.* v. *Merchants' Bank*, 6 How., 382; *Camden and Amboy Railroad Co.* v. *Baldauf*, 16 Penn., 67; *Beekman* v. Rouse, 5 Rawle, 179; *Bingham* v. *Rogers*, 6 Watts & S., 495.

I freely admit that the liability of the carrier is not in any way changed by the mere fact of a *gratuitous* carriage.

But in the case of a gratuitous carriage, the carrier may, by special contract with the passenger, stipulate that the passenger shall assume every risk, except those arising from the fraud, or reckless and culpable negligence of the *carrier himself.*

This results from the fact that *the carrier is not bound to undertake a gratuitous carriage — he cannot be compelled by law to do so.* And the doctrine is well settled both in England and in this country, that as to any carriage, whether of goods or persons, which a carrier is not bound by law to undertake, he may stipulate by special contract what risk he will assume, except that he may not contract against injury resulting from his own personal fraud, or his own personal gross negligence, which is evidence of fraud, or his own personal willful or reckless conduct.

This last would be *contra bonos mores*, and therefore void, but as to all other negligence, including that of servants, he may contract. We know of no case in the books that does not sustain this doctrine. 1 American Railway Cases, 181–4, note; *Welles* v. *New York Central Railroad Co.*, 26 Barb., 641: *Welles* v. *New York Central Railroad Co.*, 24 N Y., 181; *Perkins* v.

New York Central Railroad Co., 24 N Y., 196; *Shaw* v. *North Midland Railroad Co.*, 6 Eng. Rail Ca., 87; *Austin* v. *Manchester and S. Railroad Co.*, 5 Eng. L. and E., 629; *Austin* v. *Manchester and S. Railroad Co.*, 11 Eng. L. and E., 509; *Carr* v. *Lancashire and Y. Railroad Co.*, 14 Eng., L. and E., 304; *Chippendal* v. *Lancashire Railroad Co.*, 7 Eng. L. and E., 395; *Great Northern Railroad Co.* v. *Moreville*, 10 Eng. L. and E., 366.

[*503] In all these English cases, the court held the contracts valid, as the railway companies were not common carriers of stock, and *were not bound to undertake the contract, and, therefore, could, by contract, limit their liability.*

So also in *Wells* v. *The Steam Navigation Co.*, 2 Comst., 204. The court, in speaking of certain bailees, says: "They are not like common carriers and inn-keepers, bound to accept employment when offered, *and may make just such stipulations as they please concerning the risk to be incurred — they may say, we will answer for nothing but a loss happening through our own fraud and want of good faith.*"

But the appellee insists, that though a carrier may, by contract, limit his responsibility, he cannot exempt himself from gross negligence, either of his servants or himself. The cases cited to sustain this doctrine are all cases *where the carrier received pay for the work done*, and do not meet the point we make. They were all cases where the carrier *was bound to undertake the service.* Mr. Justice BREESE, in the case cited in 19 Ill., 141, expressly endorses the English rule, which is laid down in the cases above cited, and allows the carrier, in a case of gratuitous carriage, to say by his contract: "*We will answer for nothing but a loss happening from our personal fraud or want of good faith.*" And to the same effect in *Newhall's case*, 24 Ill., 368.

The appellee insists that the endorsement upon the back of the free ticket was only a notice, and not a contract, and cites 24 Ill., 468.

We are aware there is a large number of cases sustaining the doctrine, and we think properly, that an endorsement upon a passage ticket which has been *purchased* by the passenger, is a notice, and not a contract. *Morris* v. *Bay State*, 4 Bosw., 225; *Hollister* v. *Nowlen*, 19 Wend., 234; *Cole* v. *Goodwin*, 19 Wend., 251; *Camden and Amboy Railroad Co.* v. *Belknap*, 21 Wend., 354; *Clark* v. *Fayon*, 21 Wend., 153; *Alexander* v. *Green*, 3 Hill, 9; *Powell* v. *Myers*, 26 Wend., 594; *Quinby* v. *Vanderbilt*, 17 N. Y., 306.

[*504] The ruling in these cases is put upon the ground, that such a ticket is only intended as evidence to conductors of a payment of fare. And the reason why it is held to be but a

notice is because the presumption arises — *First*, That the passenger never knew of it; and *Second*, That he did not assent to it if he did know it.

But here the case is quite different.

The passenger had, on the 2d day of January, applied for and received a free ticket as a gratuity, which entitled him to ride upon the cars of appellant FREE, up to the first day of the next April, subject to the conditions thereon, *that is, at his own risk.* And the presumptions of the law are — *First*, That he knew of the contents of the endorsement. *Second*, That he assented to the conditions imposed thereby.

Several days after receiving the pass, he takes his seat in the train, and claims the right to be there by virtue of the pass, which itself shows the agreement under which he stipulates to ride.

The act is deliberate and well considered, is fairly understood by the passenger, and must, it seems to us, be held to show his assent to and ratification of the contract.

This was expressly so held in the cases heretofore cited. *Wells* v. *New York Central Railroad Co.*, 24 N. Y., 181; *Perkins* v. *New York Central Railroad Co.*, 24 N. Y., 196. And in the case of the *Western Transportation Co.* v. *Newhall*, 24 Ill., 468, cited by appellee.

Mr. Justice Breese delivered the opinion of the court:

This was an action on the case brought by the appellee against the appellant in the Cook county Circuit Court, for an injury received by appellee while riding on appellant's cars.

The general issue was pleaded, and also three special pleas, setting up, as a defense, the fact, that without any consideration, appellant had given to appellee a free ticket or pass to ride on the railroad for a certain time, on which ticket was endorsed this agreement: — "The person accepting this [*505] free ticket assumes all risks of accidents, and expressly agrees that this company shall not be liable, under any circumstances, for any injury to the person or for any loss or injury to the property of the passenger using this ticket."

A demurrer to those pleas was sustained, and the only question arising upon them is, as to the effect of this agreement.

There was also a plea of release by appellee to appellant, as follows: "That after the committing of the several grievances in etc., and before the commencement of this suit, to wit, on etc., at etc., the plaintiff, for a valuable consideration to him in hand paid by the said defendant, did release and forever discharge the said defendant of and from any and all liability to the said plaintiff for or by reason of the said several supposed grievances, and

each and every of them, in the said declaration set forth, concluding with a verification. To this plea, a general demurrer was sustained.

The questions presented by the record for our deliberation are, the validity of these pleas, and another question as to the propriety of certain instructions given for appellee, and the incidental question of damages which we will not consider at this time.

It is insisted by appellant, that the endorsement on the free ticket was in all respects a valid agreement, and was a perfect immunity to the company for any accident or injury that might happen to the person holding it while upon the cars, no matter how the injury might be occasioned. That the holder assumes all the risks of injury from the negligence of the servants and agents of the company, and that it was competent for the parties to make the agreement, and when made is valid and binding.

The first case cited by appellant, in support of this proposition is the case of *Welles* v. *The New York Central Railroad Co.*, 26 Barb., 641, a case quite similar to the one before us.

In that case it was held, such agreements are valid, and exempt the company from all injuries, except such as are the [*506] result of fraudulent, willful or reckless misconduct on the part of the defendant's officers or agents. It is there held also, that it is now an admitted principle that a common carrier, like other bailees for hire, may limit his risk by express contract, although a carrier cannot contract for an exemption from losses arising from his own personal fraud or gross negligence. Such a contract would be *contra bonos mores* and void.

This case was taken to the Court of Appeals, where it was held, there was nothing illegal in such contracts, and that by a fair construction, their stipulations cover every degree of negligence, save gross negligence, which is evidence of fraud or of willful injury. The court also held, that though this rule applied to individual carriers of persons, it could not apply to corporations engaged in that business. The court say, fraud and willful misfeasance include a will, a motive, and a corporation, as such, can have no motive, no will, though its agents may have both; and it would hardly do to hold the property of corporations liable for the willful or criminal act of a person employed by the corporation, as such acts cannot be said to be done in the course of his employment.

And the court further say, that the term "gross negligence," as used by the law, has a technical meaning, which is not properly applicable to those acts of servants of a corporation for which the corporation is responsible; though as between their acts which are slightly negligent, and those which are very negligent, there is no different rule of responsibility. It is the fact of neg-

ligence, mere negligence, and not its degree, which incurs the liability.

That the contract in question is, simply, a contract not to be liable for the mere negligence of the agents of the company, and that the judge who tried the cause was not authorized, by the agreed state of facts on which the case was tried, to find that the injury was the result of "gross negligence," and that the case must be considered as if the word "gross" were omitted in the finding. Justice SOUTHERLAND, who dissented, held [*507] the contract for exemption was illegal and void as against public policy, as tending to lessen the care such companies are required to bestow, and which is imposed on them as a public duty as common carriers of persons and property. This case also holds the company would be liable for gross negligence.

The next case cited by appellant is the case of Smith, administrator of Ward, against the same railroad company, 29 Barb., 132. That case also held, that while a carrier of passengers may, by positive stipulation, release himself, to a limited extent, from the consequences of his own negligence or that of his servants, the contract to enable him to do so must be clear and explicit in its terms, and plainly covering such a case. The immunity of the carrier must be shown on the face of the contract. The company was held liable for the gross negligence and want of ordinary care of their servants and agents. The holder of the free ticket in this case had taken the risk of personal injury "from whatever cause."

The case of *Bissell, administratrix*, against *this same Company*, Ibid, 602, shows the same contract, and the determination of the court was the same, that the company was liable for gross negligence, and Justice SMITH, who delivered the opinion of the court in the case of *Welles* v. *this Company*, 26 Barb., 641, and who concurred in the ruling of this case of Bissell, thought the verdict in it could be sustained without involving any inconsistency between the two cases, for the reason that Bissell's case was put on the ground of gross negligence, and that there was no evidence in Welles' case showing how the collision happened.

The next case is that of *Perkins, administratrix*, v. *this same Company*, 24 N. Y., in which it was held, that a railroad corporation could not, by contract, exempt itself from liability to a gratuitous passenger for damage resulting from its own willful misconduct, or recklessness, which is equivalent thereto. But it may contract for exemption from liability from any [*508] degree of negligence in its servants, other than the board of directors or managers who represent the corporation itself, for all general purposes.

In Welles' case, as in this, the New York courts attempt a dis-

tinction between the negligence of the corporation, acting through its president and board of directors, and the negligence of their employees or servants and agents, a distinction which, we confess, we are unable to perceive. All corporations act by and through their agents, for whose acts, in the line of their business, the corporation appointing them is held liable.

This court has held, that a railroad corporation is liable in an action of trespass for an assault and battery committed by an employee of the corporation on a passenger on the train. *St. Louis, Alton and Chicago Railroad Co.* v. *Dalby*, 19 Ill., 353.

In that case we said, in answer to the argument, that as the corporation has no lawful authority to order an unlawful act to be done, or to order a lawful act to be done in an improper way, or so that it shall violate the rights of others, the act, whenever such is the case, becomes the act of the agent and not of the corporation, that if this position was adopted, a corporation could never be held for any affirmative act, for whenever such affirmative act is a violation of the rights of another, the ready and invariable answer would be, that because such act was wrongful, it was, therefore, unlawful, and not authorized by its charter, but the individual act of those who represent it and exercise its functions. The result then would be this: if the act was right and lawful, then it is the company's; but if it was wrong and not legally justifiable, then it was not the act of the company, which, it would be said, was a stranger to it. The result of the position is, that the company cannot be liable for any trespass, for a trespass is an unlawful act, and no company or corporation can be legitimately empowered to do an unlawful act. Now there are cases to be found, mostly in the Year Books, where courts have been misled by this sort of reasoning, and held that no corpora-
[*509] tion can be liable for any trespass. But such never was the rule either of the civil or the common law, as applied to private remedies for such wrongs.

It is admitted that a corporation may commit a trespass on property, then how absurd it is to say, that if the servant of the company throws the passenger's baggage from the cars, it is the act of the company, but if he throws off the passenger himself, it is not.

This case goes the whole length of holding a corporation responsible for the unlawful acts of its employees or agents, which includes willful injuries, or injuries resulting from gross negligence.

All the cases cited by appellant admit the validity of the agreement set forth, but confine its operation to cases of ordinary, but not gross negligence. The same ruling has obtained in the courts of Great Britain. *The York, Newcastle and Berwick Railway*

Co. v. *Crisp et al.*, 78 Eng. C. L., 527; *Shaw* v. *The York and North Midland Railway Co.*, 66 Ib., 345; *Austin et al.* v. *The Manchester, Sheffield and Lincoln Railway Co.*, 70 Ib., 453. And by this court, in the case of *The Illinois Central Railroad Co.* v. *Morrison et al.*, 19 Ill., 136. It was there said the rule established in England and in this country, that railroads have a right to restrict their liability as common carriers by such contracts as may be agreed upon specially, was a good rule, the railroad companies still remaining liable for gross negligence or willful misfeasance, against which good morals and public policy forbid they should be permitted to stipulate. A reference was made, as authority for this doctrine, to 1 American Railway Cases, in note 181; Redfield on Railways, 264; 2 Ohio State Rep., 131.

And we believe the rule is now universal in the courts of this country.

All the cases cited by appellant admit that acts of gross negligence are not exempted by the agreement pleaded. The declaration was in case, in three counts, for gross negligence, to which the agreement did not apply, consequently, the court [*510] decided correctly in sustaining the demurrer to the pleas, gross negligence not being within the spirit of the contract.

The fourth plea was demurrable, for the reason, that it attempts to confine the negligence complained of to the negligence of the agents and employees of the company, for which the company was responsible, as we have said above.

While we hold this agreement did not exempt the railroad company from the gross negligence of its employees, we are free to say that it does exempt it from all other species or degrees of negligence not denominated gross, or which might have the character of recklessness. For such unavoidable accidents, as will happen to the best managed railroad trains, this agreement would be a perfect immunity to the company. It is not as appellee's counsel seems to suppose, a mere notice, like the one in the case of *Western Transportation Co.* v. *Newhall*, 24 Ill., 466. In that case, condition was printed on the back of the bill of lading or receipt for the powder. We held this was but a notice, by which the carrier's liability could not be restricted even if brought home to the shipper, but that it could be limited by a special contract with the owner of the goods.

The free ticket was a gratuity, and the acceptance and use of it establishes the endorsement thereon as an agreement between the party giving and the party receiving. By using the ticket, he assents to the terms on which it was given, and it becomes, to all intents and purposes, an agreement. In Newhall's case there

was no agreement, but a mere notice, and Newhall paid for the carriage of his goods.

We look upon this free ticket as a special contract in every sense of those words, and as covering all negligence save those we have specified.

The negligence in this case was found by the jury to have been gross, amounting, as we are inclined to think, to reckless-
[*511] ness on the part of the conductor having charge of the train in which appellee was a passenger, consequently the company are not protected by this special contract.

But there is one error of the court below which must reverse this judgment. The defendant's fifth plea sets up a release of all damages occasioned by the grievances complained of, for a valuable consideration paid by the defendant to the plaintiff.

This plea is a good plea of a release, both in form and substance.

We have looked into the books, and can find no case wherein it has been held in pleading a release that it should be averred it was under seal. A release, *ex vi termini*, imports a seal, and it is matter of evidence whether it have a seal or not, if a seal be necessary. The plea should have been traversed. The demurrer admits the release for a valuable consideration. But this court said, in *Benjamin* v. *McConnell et al.*, 4 Gilman, 536, and we repeat here, when a valuable consideration is expressed in a release, or otherwise proved to have passed between the parties, it is totally immaterial whether the instrument is sealed or otherwise. In *Ryan* v. *Dunlap*, 17 Ill., 40, this court held that a release of a debt secured by mortgage need not be under seal, *a fortiori*, it need not be, where prospective damages are released.

The declaration in the first, second and fourth counts avers gross negligence on the part of appellants, whilst the third avers negligence only. Four of the special pleas are to the whole declaration, but they do not answer the charge of gross negligence, consequently the demurrer to them was properly sustained. The appellant will have leave to amend, so as to apply the pleas to the third count, which alleges negligence only, should he desire so to do.

For this error, in sustaining the demurrer to the fifth plea, the judgment must be reversed and the cause remanded.

As to the instructions for appellee, we perceive no inconsistency or error in them.

Judgment reversed.

DENISON K. TOWN [*512]

v.

SAMUEL WOOD.

1. PLEADING—*when the plaintiff must declare specially.* When a party executes a mortgage to secure a sum of money which the mortgagee promises to pay to a third person upon a debt of the mortgagor, if the mortgagee refuses to pay the debt, the mortgagor, the mortgage being unpaid, can only recover for his failure so to do, by a suit brought upon the special contract.

2. SAME—*when recovery can be had under the common counts, for money had and received.* But the mortgage being paid, and the mortgagor having also been obliged to pay, himself, the debt which the mortgagee agreed to pay for him, he has a right to treat the money which went into the hands of the mortgagee in consideration of his undertaking to pay the debt as received by the mortgagee to his use, and to recover it back in an action for money had and received, the consideration upon which it was received having wholly failed. In such case it is not necessary to declare specially.

3. ASSUMPSIT—*for money had and received—whether money must actually be paid.* In this case the mortgage was not actually paid in money, but in a purchase of the mortgaged premises by the mortgagee from a subsequent grantee of the mortgagor, it was put in at its face as part payment for the land. Yet this was the same thing as though the mortgage had been paid in money, and the action for money had and received would lie at the suit of the mortgagor upon the failure of the consideration for which the mortgage was given.

4. MEASURE OF DAMAGES—*in an action for money had and received.* Where, in addition to the principal sum which the mortgagee was to pay for the mortgagor, there was usurious interest computed thereon for a given time, and which, with the principal sum, formed the amount of the mortgage which was paid, the measure of damages in an action for money had and received against the mortgagee, would be the whole amount paid upon the mortgage, including the usurious interest.

5. The mortgagor does not, in such case, recover back the usurious interest because it was usurious, but he merely recovers back whatever of principal and interest he has paid, because the consideration upon which it was received has wholly failed.

6. USURY—*cannot be recovered back.* Where usurious interest has been voluntarily paid by a debtor to his creditor, it cannot be recovered back.

7. MISTAKE *in settlement of accounts—whether the parties are concluded.* Although parties may agree upon a settlement made between them, as to the amount due from one to the other, yet such agreement is not con- [*513] clusive if it was the result of an error in regard to the items or in the computation of interest.

8. WITNESS—*competency—interest.* In an action by a mortgagor against his mortgagee, to recover back money paid upon the mortgage, upon the ground of a failure of the consideration of the mortgage, a subsequent purchaser from the mortgagor, who had sold the premises to the mortgagee and taken the mortgage as a part payment therefor, is a competent witness for the plaintiff. He has no interest in the result of the suit.

APPEAL from the Court of Common Pleas of the city of Aurora; the Hon. RICHARD G. MONTONY, Judge presiding.

This was an action of assumpsit instituted in the court below, by Samuel Wood against Denison K. Town. A trial of the cause resulted in a verdict and judgment in favor of the plaintiff for the sum of $1,183. The defendant thereupon took this appeal. A

sufficient statement of the case will be found in the opinion of the court.

Messrs. PLATO & SMITH and Mr. CHARLES WHEATON for the appellant.

Mr. B. F. PARKS for the appellee.

Mr. JUSTICE LAWRENCE delivered the opinion of the court:

The facts of this case, so far as they are material to the opinion of the court, are as follows:

On the 23d of March, 1859, Samuel Wood, the appellee, executed to Town, the appellant, a mortgage upon a farm of the former, to secure the payment of $2,856.47. Soon after the execution of the mortgage, Wood conveyed the land to his sons, Kenyon O. and Theodore, and, before the mortgage matured, they sold and conveyed to Town. In the last transaction, the farm was sold at $12,525, and the mortgage was put in by Town at its face, as a part of the consideration, and considered as paid. the land was sold at $25 per acre, and, so far as it went, the mortgage was applied as payment. The amount of the mort-
[*514] gage was made up of various items. One was the sum of $621.50, estimated to be the balance due on an old mortgage between the same parties. Another item was the sum of $600, which Town was to advance for Wood in payment of certain executions against the latter in the hands of one Constable Turner. This sum Town never paid, but he claims to have been released from its payment by Wood in a subsequent arrangement entered into between them, by which he insists that he also released Wood from a certain other debt of $500, due him, and not included in said mortgage. After the mortgage was canceled in the manner above described, Wood brought this suit against Town, on the ground that the latter did not pay the $600 to Turner, and the further ground that there had been a mistake in the computation, as to the balance of $621.50, supposed to be due on the old mortgage. Other errors are also alleged, but the verdict of $1,183, which the jury gave the plaintiff in the court below, seems to have been founded on these items.

The declaration contains a special count for failure to pay the $600 to Turner, and the common counts. The counsel for the appellant insist that even if the proof shows a state of case authorizing a recovery in reference to this item, such recovery could be had only under the special count, and could only be had for the $600, and six per cent. interest from the date of the mortgage. The evidence shows that in giving the mortgage, interest on the $600 was reckoned at the rate of two per cent. per month from the date of the mortgage, for the period of

about twenty and one-half months, to the date of its maturity, and this interest was added to the principal, and included in the amount of the mortgage. When the mortgage was settled, although all this interest had not accrued, it was still included in the payment, the mortgage being applied at its face. The court instructed the jury in substance that if they found the plaintiff had a right to recover the $600, he would have the right also to recover all the interest which had been charged upon it. The objection taken is, that under the [*515] special count, which is for failure to pay a specific sum, the measure of damages would be only that sum and the legal interest thereon. We deem it unnecessary to consider this question, for we are of opinion that the $600, if recoverable at all, could be recovered under the money counts, and with this sum, whatever interest had been received by Town upon it. If the mortgage had never been paid to Town, and he had refused to pay the $600, Wood, the mortgagee, being unpaid, could only recover by a suit brought upon the special contract. But Wood, having paid the mortgage, and having also been obliged to pay, himself, the $600 which Town had agreed to pay for him, he has a right to treat the money which went into Town's hands in consideration of his undertaking to pay this debt, as received by Town to his use, and to recover it back in an action for money had and received, the consideration upon which it was received having totally failed. It was not necessary to declare specially. There was money in Town's hands which equitably belonged to Wood. It was obtained by him through a lien on Wood's land, which lien he had acquired, to that extent, under a promise to pay this money. He never paid it, and the money he obtained through his promise to pay it, should be restored to Wood. Having himself diregarded his contract, Wood has the right to treat it as rescinded, and recover back the consideration paid, by this equitable form of action. And this disposes of the objection to plaintiff's third instruction. The plaintiff had a right to recover whatever money he had paid on the mortgage growing out of this $600 contract. He does not recover back the usurious interest because it was usurious — that question cuts no figure in the case — but he merely recovers back whatever of principal and interest he has paid, because the consideration upon which it was received has wholly failed by the act of Town. It would be a singular rule of law which should require us to hold that Town could receive from Wood $600 and interest for twenty months, at two per cent. per month, under an agreement to [*516] pay Turner for Wood $600, and when he does not pay this sum, that he should be obliged to account to Wood only for interest at six per cent.

Whether Wood, by an arrangement with Town, made subsequent to the mortgage, released the latter from all obligation to pay the $600 to Turner, is a question upon which the evidence is contradictory. It was fairly submitted to the jury by the instructions, and we ought not, upon the evidence before us, to set aside their verdict.

The same remark may be made as to the alleged error in the item of $621.50, which made a part of the consideration of the mortgage. This sum was agreed upon by the parties, at the time when the mortgage was given, as the balance due upon an old mortgage upon which Wood had just paid $2,000. The mortgage drew upon its face ten per cent. interest. Reckoning the interest at that rate, there was not due so large a balance as $621.50, the amount estimated in giving the new mortgage. But the counsel for the appellant insist that they in fact computed the interest at fifteen per cent. This they had an undoubted right to do, and if it was done, and the amount voluntarily paid, it cannot be recovered back. But on this point the evidence leaves the case in doubt. The jury, so far as they based their verdict upon this item, found that the parties departed from the letter of their contract, by mistake and not by design, and, as upon the other point, their finding is not so against the evidence as to justify our interference. The question was fairly submitted to them by the court.

It is also urged by the counsel for the appellant that the action for money had and received cannot be maintained because no money was actually received by Town. The mortgage was applied by him, in payment of the farm, at a definite sum. The value of the farm was fixed at $25 per acre, and the mortgage was received in payment to its full amount. It was the same thing, in substance, as if Theodore and Kenyon Wood, who had taken the land from Samuel Wood, subject to the mort-
[*517] gage, had paid the amount of the mortgage to Town in money, and had then received the money back. The property was received as the equivalent of a definite amount of money, and unless we sacrifice substance to form, we must hold that the action for money had and received will lie.

It is also urged that the court erred in qualifying the fifth instruction asked by defendant. The qualification was proper. As the instruction was drawn, it told the jury, substantially, that if the parties agreed upon the amount due, their agreement was conclusive. The court properly qualified the instruction by telling the jury, in substance, that such agreement was not conclusive if it was the result of an error in regard to the items or in the computation of interest.

It is also urged that Kenyon O. Wood was an incompetent

witness, because he was the grantee of plaintiff and grantor of defendant, but we do not perceive what interest that fact gives him in the result of this suit.

Some other objections are taken in regard to the admissibility of certain portions of the evidence, but we presume no confidence is entertained in them. The objections are clearly groundless. We have remarked upon all of the alleged errors which are worthy of consideration.

Judgment affirmed.

EDWARD F. SOWARDS
v.
EDWARD PRITCHETT.

1. NOTICE OF SALES—*posting them in public places.* A decree for the sale of land directed notices thereof to be posted in five public places in the neighborhood. Upon exceptions taken to the report of the sale, it appeared two of the notices were posted at school-houses, but it did not appear they were being occupied at the time; though, even if that were so, the court were not prepared to say they could judicially know that they would afford notice to a single man in the neighborhood.

2. The other notices were posted upon roads, one of them only being [*518] mentioned as a public road, leaving it rather to be implied the others were not. Six persons living in the vicinity of the land had never seen any of the notices, and none were posted about the court-house, nor was any published in the county newspaper. But few persons attended the sale, and the property sold for about two-thirds of its value. *Held*, the notice of the sale was not sufficient.

3. SAME—*of the necessity of sufficient notice.* Whether the want of sufficient notice of such a sale operated to prevent competition thereat, or was occasioned by design or accident, will make no difference. There must still have been proper notice.

4. SAME—*of the time for which notice should be given.* The decree for the sale fixed no time for which notice should be given. In this case, only twenty days were given; and while such notice might not, of itself, afford sufficient ground for setting aside a sale, yet, in connection with inadequacy of price, or other irregularity, it is an important circumstance.

5. It has not been the practice of courts to make sales without redemption upon so short a notice.

6. By analogy with the time required for sales by executors and administrators, which is six weeks, it would seem the legislature regarded that as but reasonable time for sales of real estate.

7. JUDICIAL SALES—*inadequacy of price.* Land was sold under a decree at about two-thirds its value; and it was held, that while such inadequacy of price would not, alone, be ground to set aside the sale, yet it would have its weight when considered with other evidence, in preventing an approval of the Master's report of the sale.

8. JUDICIAL SALES—*action thereon—discretion of the court.* It is the cherished object of the courts to give stability to judicial sales, and at the same time protect the rights of the owner. In this the Chancellor has a large discretion, which will only be interfered with by the appellate court when it appears from all the circumstances that wrong or injustice has been done.

9. SAME—*notice should be prescribed in the decree.* It is much the better practice for the Chancellor, in ordering sales of property, to prescribe the time and manner in which notice thereof shall be given, as well as the terms and conditions of the sale, and not leave these to the discretion of the Master.

WRIT OF ERROR to the Circuit Court of Woodford county; the Hon. SAMUEL L. RICHMOND, Judge, presiding.

It was provided in the last will and testament of Henry Sowards, that as soon as convenient after his youngest son, Edward F. Sowards, should arrive at his majority, the lands
[*519] belonging to the estate should be sold, and the proceeds divided among the then surviving children of the testator.

Henry Sowards, the testator, having died, and Edward, his youngest son, having attained his majority, the latter exhibited his bill in chancery in the court below, against the other devisees, for the purpose of executing that provision of the will.

Such proceedings were had in that suit, that at the April term, 1863, a decree was entered, directing the complainant to proceed to sell the lands as provided for in the will, in a reasonable time, and that he report to the court his doings at the next term; that he sell the land at public auction, posting up written or printed notices thereof in five public places in the neighborhood, setting forth therein the time, place and terms of sale, describing the premises with reasonable certainty; that the sale should be for cash, or part cash, and the balance upon credit, etc.

At a subsequent term, the complainant reported to the court, that in pursuance of the decree, he posted up five written notices on the 22d day of July, 1865, at the places named in the affidavit attached to his report, showing that he would sell the land mentioned in the decree, on the premises on the 11th of August then following; and that he did, in pursuance of such notice, proceed on the day named, at public auction, to sell the same; that John Sowards became the purchaser at the sum of $1,500, he being the highest and best bidder therefor; and the purchaser having complied with the terms of the sale, the commissioner executed to him a deed for the premises.

The affidavit of the commissioner states that he posted up the notices on the day named in the report, at the following places: One at the school-house at or near Crow Creek, in Marshall county, Illinois; one at the forks of the road leading to Chillicothe and Lacon; one at the Jefferson Horshor school-house; one at the forks of the roads at Low Gap, and one at or near Gibbs', on a public road leading up Crow Creek.

[*520] One of the defendants, Edward Pritchett, appeared and filed his exceptions to the report of the sale, and set forth the following grounds:

1. The commissioner did not give the notice required by the decree.

2. He sold the land at a price greatly below its real value—that is, he sold the same for $1,400, when it was worth $2,500 at the time of the sale, and it would have sold for that sum if the commissioner had given the requisite notice.

In support of the exceptions, the affidavits of six witnesses were read: William Hunter lived two and a-half miles from the land, on a public road, and never saw any notice of the sale, and believes none were posted. William Crank lived one mile from the land, and made the same statement. Two others lived about a-half a mile from the premises, and saw no notices, and believe there were none. Another lived less than a-half a mile, and another adjoining the land, and stated the same. There were about one hundred and fifty acres of the land, which they all thought was worth fourteen dollars per acre, and would have sold for that at a fair sale.

The sheriff, clerk and deputy clerk of the Circuit Court stated that they never saw any notice of the sale posted about the court-house; and the editor of the county paper stated that no notice was ever published in his paper.

The defendant, Pritchett, also presented his own affidavit, in which he says he is legally and equitably entitled to three-fifths of proceeds of sale of lands; that since rendering decree has moved out of immediate neighborhood; employed Crank, who lives in neighborhood, to look out for notice of sale; said Crank did keep diligent watch for said notice at all public places in vicinity of said land; no such notices were posted; that E. F. Sowards and Solomon Sowards did connive with one John Sowards, and others guilty, and fraudulently, without complying with said decree, to sell said land for the sum of $1,400, as he is [*521] informed; says said land is worth $2,500, and would have brought that amount had it been sold in compliance with said decree.

In support of the sale, the affidavit of one Cutright was read. He stated that he was the auctioneer who sold the land; that there were several others present besides the purchaser, who bid on the land. Said the sale was fair to owners and bidders. He thought the land sold for all it was worth. Another witness thought it was not worth more than a thousand dollars.

The court below, upon this evidence, refused to approve the commissioner's report, and ordered a re-sale of the property.

The complainant brings the case to this court upon writ of error, for the purpose of bringing in review the action of the Circuit Court in not sustaining the action of the commissioner.

Mr. JOHN CLARK for the plaintiff in error.

Messrs. INGERSOLL & PUTERBAUGH for the defendant in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

At the April term, 1863, of the Woodford Circuit Court, plaintiff in error obtained a decree against defendants in error, authorizing him to sell the land in controversy, under the last will of Henry Sowards, deceased. A sale was made, and afterwards, at the August term of the court, 1864, he filed his report and asked its approval. Exceptions were taken to the sale, and on a hearing they were allowed, the sale set aside, and a new sale ordered. To reverse that decree, this writ of error is prosecuted.

The objections taken to the report of the sale, are, that insufficient notices were given of the time, place and the terms [*522] of the sale, and that the property was sold at a sacrifice.

It appears that five notices of the sale were posted, but whether they were in the most public places in the neighborhood, as required by the decree, does not appear. The affidavits in support of the validity of the sale particularly state where they were posted, but fail to say that they were the most public places. Two were posted at school-houses, but it fails to appear whether they were occupied by schools at the time; but even if they were, we are not prepared to say that we could judicially know that they would afford notice to a single man in the neighborhood. The object of giving notice is that persons desiring to purchase may learn the time and place of sale, and whether these notices were calculated to convey such information does not appear.

The other notices are stated in the affidavits to have been posted on roads, but whether two of them were public roads is not stated. The other, however, was stated to be a public road, which would rather seem to imply that the other two were not, or it would have been stated. Six different persons testify that they were expecting a sale, some of them wishing to purchase the lands, and were looking for notices, but saw none. They all lived near to, and some of them adjoining, the land, and if the most public places had been selected, it is strange that so many persons seeking notice, were unable to obtain it. They, from that fact, state it as their opinion, that notices were not posted. The clerk, the sheriff and the deputy sheriff all testify, that a notice of the sale was not posted at the court-house; nor is there any pretense that such a notice was published in a county newspaper.

Here was a large and valuable property to be sold at auction without redemption, and we find half a dozen of the near neighbors having no notice of the sale. If the number of notices required by the decree had been posted in the most public places in the neighborhood, could it be that none of them ever saw or heard of them. To us it seems almost impossible. Nor [*523] does it appear, that more than one witness was introduced

to prove that they had seen the notices, or that they were posted. Nor does it appear that any considerable number of persons were present when the sale was made. It is true, the auctioneer swears that there were several, but he does not give the number. If there were two or three persons at the sale, this statement would be true. For aught that appears, they may have consisted of the executor, the auctioneer and the purchaser. And whether the want of notice operated to prevent competition at the sale, or was by design or accident, can make no difference.

Again, but twenty days' notice was given. And whilst the decree fixes no time, it is the object of the law to obtain the best price that can be fairly had at such sales, and as far as possible prevent a sacrifice of the rights of the owners. In ordinary sales of real estate by executors and administrators, the Statute requires six weeks' notice to be given, by posting notices in four of the most public places in the county, and a similar notice to be published in the nearest newspaper. It would, therefore, seem to be regarded by the Legislature that this is but a reasonable notice. So far as we are aware, it has never been the practice of courts to make irredeemable sales of real estate on so short a notice. And whilst such a notice might not, of itself, be sufficient ground to set aside a sale, yet, when connected with inadequacy of price, or other irregularity in conducting the sale, it will be regarded as an important circumstance.

The evidence, we think, abundantly shows that the land was not sold for more, or but little more than two-thirds of its value. And although such an inadequacy of price would not alone be ground to set aside a sale, yet it will have its weight when considered with other evidence, in withholding an approval of the Master's report of the sale. Although it is the duty of the Chancellor to protect a purchaser at a Master's or Commissioner's sale, it is equally his duty to prevent a sacrifice of the property, by fraud, accident or negligence of the officer in conducting the sale. If he can see that the sale has not been fairly made, by reason of [*524] a non-compliance with the law or the terms of the decree, and loss would result to the owner, he should not hesitate to withhold his approval. It is a cherished object of courts to give stability to judicial sales, and at the same time, as far as possible, protect and guard the rights of the owner. In all such cases the Chancellor is necessarily vested with a large discretion, and he must so exercise it as will promote justice and protect the rights of parties. And in the exercise of that discretion this court will not interfere if it seems to have been soundly exercised. We will only reverse when we can see from all the circumstances that wrong or injustice has been done.

We are clearly of the opinion, that the court below committed no error in withholding an approval of the report of the sale, and in setting it aside, and ordering the land to be again sold. And we are of the opinion, that it is much the better practice for the Chancellor, in ordering sales of property, to fix the time and manner in which notice shall be given, together with the terms and conditions of the sale. Such directions would control the action of the Master, and would greatly diminish the probabilities of having sales set aside. It would operate to assure the purchaser that his bid would be received, if there was no departure from the requirements of the decree in conducting the sale, and thereby tend to increase the price of property thus sold. It would remove all question as to whether the Master was exercising a proper discretion in making the sale. For aught that appears, it may have been a question in the mind of the purchaser whether twenty days' notice was sufficient for such a sale, and may have operated to depress the price.

The decree of the court below must be affirmed.

Decree affirmed.

[*525] OLIVER P. SECOR
v.
SARAH M. PESTANA.

1. LANDLORD AND TENANT — *notice to quit.* When a tenancy is for a fixed period, and the term thus expires by its own limitation, the tenant is then bound to surrender, and no notice to quit is necessary.

2. The act of 1861, on the subject of notice, applies only to tenancies of uncertain duration, as tenancies from year to year, in which sixty days' notice is required, and tenancies by the month, or for any time less than one year, when the tenant holds over without any special agreement, when thirty days' notice is required.

3. TENANCY FROM YEAR TO YEAR — *what constitutes.* Premises were leased by writing for a term to expire on the 1st of May, 1863. Afterwards, by a verbal agreement, the tenant leased the same until the 1st of May, 1864 *Held*, that this did not constitute a tenancy from year to year.

4. ESTOPPEL — *effect of notice to quit when not required.* The fact that a landlord has given his tenant notice to quit, when from the character of the tenancy no notice was required, will not commit the landlord as to the nature of the term; but he may repudiate the notice and place himself on the true ground.

5. EVIDENCE — *admissions — to whom they should be made.* Where a tenant has made admissions or declarations as to the character and extent of his tenancy, they are admissible against him in a suit between him and his landlord in respect to the possession, no matter to whom they were made. It is not essential that such admissions, to be available, should be made to the party or his agent.

6. INSTRUCTIONS — *should be relevant.* It is proper to refuse an instruction asked by a party in an action of forcible detainer, which is based on the idea of a tenancy from year to year, when that was not the nature of the tenancy about which the controversy existed.

APPEAL from the Circuit Court of Cook county; the Hon. ERASTUS S. WILLIAMS, Judge, presiding.

This was an action of forcible detainer commenced before a justice of the peace in Cook county, by Sarah M. Pestana against Oliver P. Secor. The case was removed into the Circuit Court by appeal, where a trial resulted in a verdict and [*526] judgment for the plaintiff. The defendant thereupon took this appeal. The facts are sufficiently presented in the opinion of the court.

Mr. CHARLES C. BONNEY and Mr. J. EDWARDS FAY for the appellant:

The principal question arising under the assignment of errors, is as to the character of the tenancy, and whether a notice to quit was requisite, and if so, whether the notice given was sufficient.

It appears that the plaintiff below leased the premises to the defendant, by writing, for a term to expire on the 1st day of May, 1863, at which time, by a verbal agreement, the defendant leased the same until the 1st of May, 1864.

This, we contend, was a tenancy from year to year, and embraced in the provisions of the act of 1861, Sess. Laws, p. 134, requiring sixty days' notice before suit brought. Such notice was not given.

Mr. GEORGE F. BAILEY for the appellee:

No notice was required to terminate the tenancy. It was limited by the new agreement to May 1, 1864, at which time the tenant was bound to surrender.

At common law, in tenancies from year to year, and others of uncertain duration, notice is required in order that the tenant may prepare for an event, which, until notice, is wholly contingent.

But, by where the terms of the lease, its duration is fixed, the reason of the rule ceases, and notice is unnecessary. *Cobb* v. *Stokes*, 8 East, 358; *Jackson* v. *Brant*, 2 Johns. R., 169; 4 Kent, 114; Taylor Land. and Ten., p. 44, chap. 2, sec. 1.

This case is not embraced in the act of 1861. It was not the purpose of that act to alter the common law, with reference to tenancies of certain and definite duration, but merely to fix a uniform rule in a class of cases in which the tenancy, as [*527] well as the law respecting the notice required to terminate them, was uncertain. It relates expressly to tenancies from year to year, and to an inferior class of tenancies, less than a year, in which there is a holding over without special agree-

The tenancy in question belongs to neither of these, and therefore the case must be governed by the law as it stood previous to the act of 1861.

The term "tenancy from year to year" is well defined and understood; and these words were used by the Legislature in their legal or technical sense. Such a tenancy arises where lands or tenements are leased to another without limiting any certain or determinate estate, but an annual rent has been secured. Taylor, Land. and Ten., 38; referring to Com. Dig. tit. Estates, (H.,) 1; 1 Stephen Com., 271; 4 Kent's Com., 111, 114.

It may also arise, where one holds over, with the consent of the landlord, after the termination of a lease for years, without a new agreement as to the duration of the renewed tenancy. 4 Kent, 112.

Secor took possession under the written lease which expired May 1, 1863. He continued in possession after that time, under a new parol lease, which expired May 1, 1864. He was therefore a "tenant for years," instead of a tenant from year to year.

Mr. JUSTICE BREESE delivered the opinion of the court.

This was an action of forcible detainer. The facts briefly stated are, that the appellee leased, by writing, certain premises on Dearborn street, in the city of Chicago, for a term to expire on the first day of May, 1863. Afterward, by a verbal agreement, appellant leased the same until the first day of May, 1864, and the question is, was the tenant entitled to notice to quit, before action brought.

This tenancy was for a fixed period, namely, to the first day of May, 1864, consequently no notice was necessary. On [*528] that day, appellant was bound to surrender the premises, as his term had expired by its own limitation. Taylor's Landlord and Tenant, chap. 2, sec. 1, p. 44; *Walker et al.* v. *Ellis*, 12 Ill., 475.

The act of 1861 applies only to tenancies of uncertain duration, as tenancies from year to year, in which sixty days' notice is required, and tenancies by the month, or for any time less than one year, when the tenant holds over without a special agreement, when thirty days' notice is required. Sess. Laws, 1861, p. 136.

It is urged the court erred in refusing the following instructions asked for by appellant:

1. If the jury believe, from the evidence, that after the lease, introduced in evidence, expired, the defendant, by verbal contract with the plaintiff, leased the premises for another year, then in such case the defendant became a tenant from year to year, and was entitled to a notice for sixty days if the plaintiff desired pos-

session of the premises at the end of that year, and unless such notice is shown by the evidence, the jury must find for the defendant.

2. If the jury believe, from the evidence, that the defendant, under a verbal agreement, entered upon and occupied additional premises than those described in the lease, after the termination of the original written lease, and the description of the premises in the plaintiff's complaint and notices, includes or describes only the premises in the said written lease, then the variance between the proof and the description is fatal, and the jury must find for the defendant.

4. If the jury believe, from the evidence, that after the expiration of the original tenancy, the defendant continued to occupy the premises under a new agreement for one whole year, or for an indeterminate period of more than one year, it was a tenancy from year to year, and the defendant was entitled to a notice in writing of sixty days before the end of the year, and unless such notice was given, the jury must find for the defendant.

5. The jury are instructed that mere verbal declarations [*529] made to persons who are not the agents of both or either of the parties cannot be taken as binding the party making them, and must be disregarded in the consideration of the evidence, and unless the jury believe, from the evidence, that Mary and Sarah Pestana were the agents of the plaintiff, and acting at her instance at the time when they say Secor said he was going to leave on the first of May, and that, as such agents, they were authorized to receive and agree to a proposition to quit, then such a declaration, on the part of Secor, could not bind him or shorten his term afterwards agreed to by the plaintiff, and unless the jury believe, from the evidence, that such declarations were so agreed to, they should reject them altogether.

7. The plaintiff having served notices to quit and acted as though she considered them necessary, cannot now abandon that ground and seek to recover on the ground that no notice was necessary.

These instructions were properly refused, the first because it was not a tenancy from year to year; the second, for the reason there was no proof of the occupancy of additional premises different from those described in the lease. There was an alteration merely, by throwing down a partition wall, by which means the appellant's accommodations were increased. The fourth was properly refused, as no tenancy of the kind specified in it was proved.

As to the fourth instruction, it was properly refused, because the admissions and declarations of appellant were admissible, no matter to whom made, as confessions relating to the character

and extent of his tenancy. There is no rule of law requiring such admissions to be available, that they should be made to the party or his agent.

The seventh instruction was properly refused, because appellee was not committed by the notices she had served, as to the character of the tenancy. It was her right to repudiate them and place herself on the true ground.

[*530] As to the ninth instruction, which the court did not give or refuse, it is only necessary to say, it is based on the idea of a tenancy from year to year, which, we have said, was not the nature of the tenancy about which the controversy existed.

Perceiving no error in the record, the judgment of the court below must be affirmed.

Judgment affirmed.

JOHN McEWEN
v.
SAMUEL H. KERFOOT.

1. SPECIAL PLEA — *when it amounts to the general issue.* In action of assumpsit to recover "for commissions on sale of land made by the plaintiff for the defendant, at the defendant's request," the defendant pleaded specially, that "the plaintiff, not being the agent of the defendant, but without authority thereto, pretended to sell" the real estate of the defendant, and executed and caused to be recorded a writing purporting to be a sale thereof, by reason of which, and to avoid such pretended sale, the defendant had incurred expense and damage which he offered to set off against such claim as the plaintiff might establish. This plea did not amount to the general issue. Its object was simply to set off unliquidated damages arising out of the subject matter of the suit.

2. It did not seek to put in issue the question of agency, for the agency was not averred in the declaration. The recital in the plea on that subject was only by way of protest, that the pleader might not be considered as admitting the agency of the plaintiff.

3. AGENCY — *when the authority of an agent ceases.* A party was employed as an agent to sell certain real estate belonging to his principal. The agent negotiated a sale as directed, by a verbal agreement, which the principal afterwards repudiated. Subsequently, the agent executed a written instrument to the purchaser, as evidence of the sale, upon the terms stipulated in the prior verbal agreement. *Held*, that when the agent found his principal had repudiated the sale, although the repudiation may have been improper, his functions as an agent, so far as regarded that sale, were at an end, and he had no right afterwards, under pretense of protecting the purchaser, or to embarrass his principal, to give the purchaser the written contract.

[*531] 4. SAME — *whether agent entitled to compensation.* Still the agent was entitled to his commissions for the sale made by him within his authority.

5. SAME — *liability of agent to his principal—set off — unliquidated damages.* And the principal was entitled to, and could set off in an action brought by the agent for the recovery of his commissions, any damages he may have incurred in consequence of the execution of the written contract by the agent after he was made aware the principal had repudiated the sale.

Appeal from the Superior Court of Chicago.

This was an action of assumpsit brought in the court below by Samuel H. Kerfoot, against John McEwen, to recover "for commissions on sale of land made by the said plaintiff for the said defendant, at the said defendant's request."

A question is made whether a special plea, filed by the defendant, amounts only to the general issue, and the pleadings, in view of that question, are sufficiently set forth in the opinion of the court. The substance of that plea is, that the plaintiff, not being the agent of the defendant, or authorized so to do, sold certain real estate belonging to the defendant, and executed a written memorandum in respect thereto to the purchaser, to avoid which the defendant had incurred great expense and damages, which he sought to set off against the plaintiff's claim, alleging that these damages arose out of the same subject matter as that upon which the plaintiff's alleged cause of action is based.

The propriety of the plaintiff's action pending the transaction is brought in question, and whether he is entitled to commissions. The circumstances connected with the sale, as developed in the testimony, are these: It seems the plaintiff was engaged in buying and selling real estate on commission in the city of Chicago, and the defendant desiring to dispose of two certain pieces of property, placed them in the hands of the plaintiff for sale, fixing the price at $6,000 for one, and $6,500 for the other, or $12,000 for both.

John C. Garland testified: In the summer and fall of 1863, I was engaged in purchasing real estate for John Garland, my father. I found this property for sale at the plaintiff's office. He told me that it belonged to McEwen, that the [*532] price was $6,000 for one, and $6,500 for the other house, or $12,000 for the two, and where the property was situated. I called to see McEwen, but did not find him. I looked at the property, and saw Kerfoot again. I tried to buy the property for less, but Kerfoot said he would bring McEwen and me together; a day was set and we went. This was on the 20th day of October, 1863, at Kerfoot's office. Kerfoot said to McEwen, there is Mr. Garland, with whom I have been talking about your property. I then talked with McEwen, and asked him his price. He said he had already set a very low price, that his property was really worth $12,500, but if I would give $12,000 for it I could have it. In answer to my question as to whether his title was clear, he said there was a mortgage on the property which was not due, and he did not know whether the mortgagee would take the money now or not; if not, the purchaser would buy subject to the mortgage. I asked him when he could learn. He

answered this afternoon or to-morrow. We then made a regular agreement to meet at the same place at 12 o'clock the next day, and then I would let him know if the mortgagee would take the money. I went out that evening and told my father. I did not agree to buy the property that day, but had till next day at 12 o'clock to decide. The next morning, the 21st, I could not keep the appointment at 12 o'clock; I went to Kerfoot's office at 10 o'clock, and told him "I would take the property with the mortgage on or off at $12,000." If on, of course the amount would be deducted from the purchase money. The next morning the 22d, I received a note from Mr. Kerfoot, asking me to come up to his office. I went there about 10 o'clock, A. M., and found Kerfoot and McEwen talking. Kerfoot asked me to repeat what I had said the day before, and I did so. McEwen said the mortgage can be taken up, but I won't sell without I get $12,500, for I have that offer. Kerfoot said, "but, Mr. McEwen, the property is sold," and when McEwen grew excited, Kerfoot said, "now
[*533] you better hold your horses, Mc., and settle this right here, and not get into trouble." McEwen then went out of the office.

The same witness, on cross-examination, testifies as follows: No memorandum was made, nor any money paid, till after the talk at Kerfoot's office on the 22d day of October. I first learned that McEwen was dissatisfied at that talk. I did not previously know that he did not want Kerfoot to sell the property to me or my father. I really believed that he wanted Kerfoot to sell it to me, till some two weeks after the 22d. I gave a check for $1,000 to Kerfoot. I don't know that the check was not paid. I don't know whether it has been given up. I have not made any efforts to get it back, or to procure a statement from McEwen that he had no claim on it. I can't tell whether I or my father went to the bank and forbade the payment of that check. I can't tell which of us did so. At the talk in Kerfoot's office there was a good deal of high talk. Defendant told me he did not keep the appointment at noon at plaintiff's office. McEwen said he did not want any more humbugging. He said he had changed his price, and that he had an offer at $500 more. I did not learn from any other person that McEwen did not want me to have the property. I did not have any conversation with any one before said 22d of October, to that effect. I did see Thomas Allen on the 22d of October, and asked him if he had the property for sale. He said I have and I have not; that he would know the next day at 12 o'clock. He did not tell me that he had sold one of the lots for $6,500 or for any other sum. I did not see him at his office on Clark street, in this city, on the 21st day of October, 1863. I did not tell him that if the other lot was not

sold I thought I would take it, nor words to that effect. I did not mention any price of the houses to him, nor did he to me.

On the part of the defendant,

Thomas Allen testified as follows: I am a real estate agent in Chicago, and know the parties to this case, and the property in question. I had it for sale some two weeks before the 21st of October, as agent for defendant. On the 20th day of said [*534] October, I negotiated a sale of one of the houses and lots to John F. H. Grace, through Maclay & Kedzie, for McEwen, at $6,500. This sale was closed up — that is, the bargain was settled on the next day, the 21st. On said 21st day of October, 1863, John C. Garland, the witness for the plaintiff, came to my office on Clark street, in this city, about 10 o'clock in the forenoon. He asked me if I had the property for sale. I answered "I have — and I have not. I have sold one of the houses and lots for $6,500, and shall know to-morrow, at 10 o'clock, whether I shall have the other for sale or not." He replied, "Well, if you do, I think I shall want it," or, "will take it." We were both speaking about the property in question. This was all that was said; and he did not call again.

John H. Kedzie testified as follows: I am a land agent in this city, and know the parties and the property in question. With my partner, Mr. Maclay, and Mr. Allen, I negotiated a sale of one of the houses and lots to Mr. John F. H. Grace. He got the property, and McEwen paid us commissions for the sale. This sale was negotiated on the 20th day of October, between Grace and ourselves; and if the property was not sold by any other party before 12 o'clock the next day, this sale was to be carried into effect. This sale was at $6,500. There was delay in carrying it into effect; for when the abstract was furnished we found a paper had been recorded, purporting to be a sale of said property, by Kerfoot, as the agent of McEwen, to Garland; and providing for this, delayed the matter. Grace had wanted the property before, but McEwen said he would hold on until 12 o'clock on the 21st; that he was under obligations to plaintiff until that time. Defendant told us, on the 20th, that if plaintiff did not sell the property by 12 M., on the 21st, then we might sell the property on the afternoon of the 21st. I sold the property to Grace. About two weeks after the sale, I went with McEwen to Kerfoot's office to see about the matter. McEwen said to Kerfoot, "How about the sale you claim to have made to Garland." Kerfoot said in reply, "Now, Mc., you aint going to make any [*535] trouble about that, are you?" Then McEwen said, "How could you sell to Garland for $12,000, when I had instructed you not to sell for less than $12,500." Kerfoot admitted that he had such instructions before the memorandum of sale was made, but

said that Garland claimed the property by virtue of the previous conversation.

This is all the testimony going to show the plaintiff's action in regard to the sale.

The case was submitted to the jury upon the general issue alone, and they returned a verdict for the plaintiff for $375. A motion for a new trial was overruled, and judgment entered upon the verdict. From that judgment the defendant took this appeal, and now insists that his special plea did not amount simply to the general issue, and, therefore, the plaintiff's demurrer thereto was improperly sustained; and the question also arises, whether the plaintiff was entitled, under the circumstances, to recover his commissions for negotiating the sale, and whether the action of the plaintiff in executing the memorandum of the sale to Garland after the defendant had repudiated the sale, was so far improper as to entitle the defendant to set off or recoup such damages as resulted to him from that action.

Mr. Charles C. Bonney for the appellant.

Messrs. Hervey, Anthony & Galt for the appellee.

Mr. Justice Lawrence delivered the opinion the court:

This was an action of assumpsit brought by Kerfoot for the purpose of recovering commissions alleged to be due to him for selling certain real estate in the city of Chicago, belonging to McEwen. The declaration contained only the common counts—the count for work and labor having this clause: "and in like sum for commissions on sale of land made by the said [*536] plaintiff for the said defendant, and at the said defendant's request." The defendant pleaded the general issue, and the following special plea:

"And for a further plea in this behalf, the said defendant says, *actio non* because he says that he, the said defendant, hath against him, the said plaintiff, a certain claim and demand, for this, to wit: that the said plaintiff not being the agent of the said defendant, but without lawful authority thereto, pretended to sell to one John Garland, certain lands, houses and real estate of the said defendant, known and described as numbers 359 and 361 Ohio street, in the city of Chicago, and caused and permitted to be recorded in the recorder's office of said county of Cook, a memorandum in writing, purporting to be a sale of said premises to said Garland, whereby said defendant was put to great trouble, expenses, delay and annoyance in and about the bringing of a suit in chancery, and thereby bringing about a compromise of the claim of said pretended purchaser, and procuring the release and conveyance of the same, and the removal of the cloud thereby

cast upon the title of said defendant to said premises, whereby the said defendant hath sustained damage for which he hath a claim and demand against the said plaintiff for the sum of one thousand dollars, and this he, the said defendant, is ready to verify, wherefore he prays judgment, and that the amount thereof may be in the first place set off against any demand which said plaintiff may establish in said action against the said defendant, and that the residue may be certified in favor of said defendant and execution awarded against the said plaintiff pursuant to the statute, etc."

The plea was afterwards amended by inserting after the averment of damages the following: "And the said defendant avers that the commissions and causes of action whereof the said plaintiff hath declared, are claimed and demanded by said plaintiff for, upon and out of the same subject matter that is set forth in this plea; and not upon or out of any other dif- [*537] ferent subject matter."

The plea, as amended, was demurred to, and the demurrer sustained. The defendant abided by his plea.

The only objection taken to this plea, in the printed argument of the defendant, is, that it amounts to the general issue, by denying the agency of the appellee. The declaration, however, nowhere avers the agency, and it can only be inferred from the clause in the work and labor count above quoted. The plea cannot be considered as seeking to put in issue what is not averred in the declaration. The object of the plea is merely to set off unliquidated damages arising out of the subject matter of the suit, and the phrase in the plea "not being the agent of the said defendant," is merely a recital, by way of protest, that the pleader may not be considered as admitting the acts complained of by him were performed under an authorized agency.

The plea does not amount to the general issue, and the demurrer, though special, should have been overruled.

We do not deem it necessary to discuss the evidence or instructions further than to say, that although Kerfoot seems entitled to his commissions for the sale made by him within the authority of McEwen, yet when he found that McEwen repudiated that sale, although he may have done so improperly, Kerfoot's functions as an agent, so far as regarded that sale, were at an end. The rights acquired by the purchaser Kerfoot should have left to him to establish as against his principal. Whether the conduct of his principal was right or wrong in repudiating the sale, it was enough for Kerfoot, as his agent, to know that he had repudiated it, and after that moment, he had no right, under pretense of protecting the purchaser, to embarrass his principal by giving the purchaser a written contract to be reduced to record, drawn upon

a basis which his principal had refused to sanction. Kerfoot is entitled to his commissions, and McEwen to any damages [*538] he may have incurred in consequence of the issuance of the written contract by Kerfoot, after he was made aware that McEwen had repudiated the sale. Judgment reversed and cause remanded.

Judgment reversed.

CHARLES E. HOVEY
v.
ROBERT THOMPSON & CO.

1. INSTRUCTIONS—*should not exclude any facts which ought to be considered.* In an action to recover the amount of an account, the plaintiff gave in evidence certain pass books. The court instructed the jury "that they add up the pass books to ascertain the amount thereof." This was calculated to mislead the jury, as they might have understood it as directing them that the books were of that character of evidence which would exclude from their consideration all other questions except the amount when footed up as extended by the person making the entry, when there were other questions to be considered in making up their verdict.

2. The goods sued for were sold and delivered to one Soper, as the plaintiffs alleged, on the credit of the defendant, Hovey, and by his arrangement. The court instructed the jury that if they believed, from the evidence, that the goods in question were sold on the credit of Hovey, by his arrangement, they would find for the plaintiffs. This instruction is subject to the same objection as the preceding. It should have been so modified as to have informed the jury that if the goods were purchased on the credit of Hovey, and had not been paid for, then they should find for the plaintiffs.

3. EVIDENCE—*pass books.* Where a person in dealing with a merchant, uses a pass book which is presented to the merchant when articles are purchased, and they are entered in the book which is returned to the buyer with the goods, in an action by the merchant to recover for the goods thus sold, the pass book, it seems, is admissible in evidence for the plaintiff, but is only proper evidence to fix the amount of the goods purchased. Where the pass book was used by a third person for whose use the goods were being bought, the book would not tend in any degree to prove the goods were sold on the credit of the defendant.

4. PRACTICE—*jury taking papers given in evidence on their retirement.* Papers and books given in evidence upon a trial may properly be taken by the jury on their retirement to consider of their verdict.

[*539] WRIT OF ERROR to the Circuit Court of McLean county; the Hon. CHARLES EMERSON, Judge, presiding.

This was an action of assumpsit instituted in the court below by Robert Thompson & Co., against Charles E. Hovey, to recover for goods, wares and merchandise sold and delivered.

It appears the plaintiffs, Thompson & Company, were merchants, doing business at Bloomington, in this State. The goods sued for were sold and delivered to one Thomas H. Soper, but, as the plaintiffs allege, at the request and upon the credit of the defendant, Hovey.

Soper, it seems, was a contractor in the erection of the Normal

University building, which was in course of construction at Bloomington at the time the account sued upon was made. Hovey was a member of the Board of Education who had charge of the enterprise, and one of the building committee having in charge, to some extent, the construction of the building.

On the trial, the plaintiffs offered in evidence certain pass books which were used by Soper during the time the account was running, the character of which will appear from the testimony of *David Gillespie*, as follows: From November, 1857, to July, 1861, I was book-keeper for Thomas H. Soper, part of the time in Chicago and part of the time here; Soper was the contractor for the wood work in the Normal University building. Two small books — one with, the other without a cover — were then shown to the witness. He was asked if he recognized the books, and what they were. He replied that they were pass books. On being asked whose, he replied that they were Soper's pass books; that when he wanted goods he sent those books to R. Thompson & Co., and they sent the goods, with the charges for the goods in the books, and returned the books with the goods.

These pass books were used by Soper and Hovey, in settlement between themselves, for the amount of goods purchased; and orders were given by Soper to Hovey, on the Board of Education, for such amounts.

The pass books were then offered in evidence, and were [*540] admitted against the objection of the defendant, who excepted. They were made up of entries of items with the amounts extended in a column, each page being footed up and the result carried forward to the next page.

The remaining evidence it is not necessary to notice, as it is not involved in the decision of the case. Upon the closing of the testimony, the court instructed the jury for the plaintiffs as follows:

1. The court instructs the jury that they add up the pass books to ascertain the amount thereof.

2. If the jury believe, from the evidence, that the goods in question were sold on the credit of C. E. Hovey, by his arrangement, they will find for the plaintiffs.

To the giving of which, the defendant excepted.

The jury, upon retiring to consider of their verdict, were allowed to take with them the pass books and certain bills of lading which had been given in evidence, to which the defendant objected. They returned a verdict for the plaintiffs for $759.77. A new trial was refused, and judgment was entered upon the verdict.

The defendant thereupon sued out this writ of error, and now questions the propriety of giving the instructions for the plain-

tiffs, and allowing the jury, on their retirement, to take with them the pass books and bills of lading which had been given in evidence.

Mr. W. H. HATCH for the plaintiff in error.

Mr. E. M. PRINCE for the defendants in error.

Mr. CHIEF JUSTICE WALKER delivered the opinion of the court:

The giving of the first and second instructions for plaintiff below is assigned as error. They are these — 1st, The [*541] court instructs the jury that they add up the pass books to ascertain the amount thereof; and 2d, if the jury believe, from the evidence, that the goods in question were sold on the credit of C. E. Hovey, by his arrangement, they will find for the plaintiffs. These instructions, we think, were calculated to mislead the jury. The first only requires them to add up the pass books to find the amount of goods charged upon them. The jury might have understood the instruction as directing them that the books were of that character of proof as precluding all other questions than the amount when footed up as extended by the person making the entry, whilst, if the proof satisfied them that the goods were obtained on the credit of Hovey, still it was their right to ascertain whether the price was correctly carried into these columns. And it was also for them to ascertain from the evidence, even if the goods were sold on the credit of plaintiff in error, whether any portion of them had been paid for by a previous settlement or otherwise, whilst this instruction seems, by implication at least, to inform the jury that they only had to ascertain the amount as charged and to allow it against plaintiff in error. This instruction should have been modified before it was given.

The second should have been modified by informing the jury that if they were purchased on the credit of plaintiff in error, and had not been paid for, then they should find for defendant in error. The goods may have been purchased on Hovey's credit and by his arrangement, and yet they may have been paid for at the former settlement, at least in part, and this question should have been clearly presented to the consideration of the jury. We think it was not, by this instruction, and that they may have been misled by it.

The pass books were only proper evidence to fix the amount of the goods purchased, and were only proper to be considered for that purpose, in case the jury were satisfied that Hovey authorized defendants in error to furnish them to Soper. The books did not, in the slightest degree, tend to prove that Hovey

had given such authority. That was a fact which had to [*542] be proved by other evidence than the pass books.

It is again objected, that the jury were permitted to take the pass books and bills of lading with them when they retired to consider of their verdict. They were offered and read in evidence, and were thereby in the possession of the jury, and could be taken from the bar to their room. (Scates' Comp., 261, Sec. 30, Practice Act.) There was no error in this, but for the reasons already given, the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

JOHN COMSTOCK
v.
WILLIS M. HITT.

1. GRANTEE OF ONE HOLDING AN EQUITABLE TITLE—*his liability for the unpaid purchase money on the prior sale.* A party purchasing land gave his notes for the purchase money, and received a bond for a conveyance when they should be paid. While a portion of these notes remained unpaid, the purchaser sold and conveyed the premises to a third party. *Held*, there being no express covenant or agreement on the part of the grantee of the person holding the title bond, to pay the balance of the purchase money due under the former purchase, nor any deduction of the amount from the purchase price, from which such an agreement might be implied, he cannot be held liable therefor to the holder of the notes for the same.

2. SAME—*what would constitute an agreement to pay—construction of a deed.* The title bond in question was executed by Heman Baldwin to Ann C. Wilson. The deed from the latter contained this clause: "subject, nevertheless, to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named." This language could not be construed into an agreement on the part of the grantee accepting the deed, to pay the outstanding notes of the grantor. The whole extent of that clause in the deed was, that if the grantee would pay the obligee in the bond he could compel the execution of a deed to him. If he did not, he would get no title.

3. GRANTEE OF A MORTGAGOR—*where there is an agreement to pay, or the amount of the incumbrance is deducted from the price.* The case above stated is wholly variant from one where a grantee of a mortgagor agrees [*543] to pay the incumbrance, or it is allowed to the purchaser by a deduction from the price of the land, from which the law would imply a promise on his part to indemnify the grantor against the mortgage debt.

4. TAKING A DEED "*subject to an outstanding mortgage,*" creates no personal liability on the grantee to pay off the incumbrance, unless he has specially agreed to do so, or the amount of the mortgage has been deducted from the purchase price.

5. PARTIES—*to whom the subsequent purchaser would be responsible, if at all.* But if the grantee in this case were under any obligation in regard to the outstanding notes of his grantor, it would be to him and not to the holder of the notes.

WRIT OF ERROR to the Circuit Court of La Salle county; the Hon. MADISON E. HOLLISTER, Judge, presiding.

This was a suit in chancery instituted in the Circuit Court by

Willis M. Hitt, against John Comstock. The facts are set forth in the opinion of the court. The question presented is, whether the grantee of one who holds a bond for the conveyance of land upon the payment of certain notes given for the purchase money, is liable for the unpaid portion of such notes, without any agreement to that effect on his part, or the amount of the outstanding notes being deducted from the purchase price. And also, as to the effect in the deed of a clause, that it is subject to such bond.

Mr. H. M. WEAD for the plaintiff in error.

Messrs. BULL & NASH for the defendant in error:

We insist that Hitt, the holder of the unpaid notes given by Mrs. Wilson to Baldwin for the purchase money, was entitled to a personal decree against Comstock, the grantee of Wilson and wife, under this clause in the deed: "Subject, nevertheless, to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named."

First, The legal effect of that clause is, that Comstock shall protect Wilson from the balance of the purchase money, by [*544] paying the same. *Townsend* v. *Ward*, 27 Conn., 614; *Thompson* v. *Thompson*, 4 Ohio St. R., 333; *Tweddell* v. *Tweddell*, 2 Brown Ch., 154.

Second, That Hitt has the right to rely upon that legal obligation from Comstock to Wilson, and if Comstock fails to keep the same, to compel him to do so by bill in chancery. Cases cited above; also, *Halsey* v. *Reed*, 9 Paige Ch. R., 452; *Curtis* v. *Tyler*, 9 Ib., 432; *Marsh* v. *Pike*, 10 Ib., 595; *Bank of Auburn* v. *Throop*, 18 Johns., 505; *Starkie* v. *Mill*, Stiles R., 296; *Lee* v. *Rook*, Moseley R., 318; *Schemorhorn* v. *Vanderheyden*, 1 Johns., 139; *Warner* v. *Beardsley*, 8 Wend., 199; *Ranbaugh* v. *Hayes*, 1 Vern. R., 130.

Mr. E. S. HOLBROOK for the plaintiff in error, in reply:

There is no proof of any express undertaking on the part of Comstock, the grantee of Wilson and wife, to pay the notes given by them to their vendor for the purchase money, and it is denied on the part of the plaintiff in error, that any such liability arises, either from any clause in the deed, or from his position as a purchaser. The only language contained in the deed from which any agreement to pay the notes could be implied, is this: "Subject, nevertheless, to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named." Clearly, these words are employed only to give notice of the incumbrance. They are followed by covenants of warranty, which show that the grantors took upon themselves to perfect the title, and preclude the idea that the grantor bound himself so to do. Comstock purchased the *privi-*

lege of paying the purchase money still due, and taking a deed—nothing more. The case of *Tichenor* v. *Dodd*, 3 Green Ch., 454, is a much stronger one for the proposition of the defendant in error than this, for there the deed was made "subject to the payment of a certain mortgage thereon," and the court say: "The purchaser of a mere equity of redemption purchases a *right*, and does *not assume* an *obligation* to redeem."

But our own court has settled this question in the case [*545] of *Winkelman* v. *Kiser*, 27 Ill., 21. The case of *Belmont* v. *Cowan*, 22 N. Y., 438, holds that "a purchaser of mortgaged premises, reciting the full consideration of $12,000, with *habendum* clause, subject to four mortgages, amounting, etc., which has been estimated as a part of the consideration, and deducted therefrom, assumes no personal liability for the payment of the mortgages." The same doctrine is held in 1 Gray, 317, 324.

The cases cited by the counsel for the defendant in error, the principal ones being in Paige's Chan. R., I think are against the current of authority, but I care not to labor to overcome them, as the defendant in error is not within their scope for the want of evidence of a promise to pay, by Comstock, either the debt of Wilson, or the incumbrance on the land, or that the amount still due formed a part of the purchase price.

Mr. E. F. BULL, for the defendant in error, in reply to Mr. Holbrook:

The counsel for the plaintiff in error admits that if the vendee takes a conveyance subject to an incumbrance, and agrees to pay the same, if he fails to do so the vendor may have his action against him. So there is no dispute upon that point.

But I have shown by authorities that the legal effect of the clause quoted, in this deed to Comstock, is, that he shall indemnify his grantor by paying the incumbrance. It follows, that the clause is of the same effect as an express agreement so to do. See 27 Conn., 614; 4 Ohio, 333, supra. This is supported by reason as well as authority, for if it is not true, and Wilson should be compelled to pay this incumbrance, Comstock, without consideration, would reap the full benefit of the removal of the incumbrance, and Wilson would have no remedy. The cases cited by Mr. Holbrook do not support his position.

In *Miller* v. *Whipple*, 1 Gray, 17, the court simply [*546] say that an action at law cannot be maintained by the holder of the incumbrance against the vendee, that was the only question in the case.

In the case of *Belmont* v. *Cowan*, 22 N. Y., 438, seems to be decided upon what the proof, *aliunde* the deed, seems to have shown was the intention of the parties. The court says "The

authorities do not furnish any guide, etc.," showing clearly that the cases I have cited, such as *Tweddell* v. *Tweddell*, *Townsend* v. *Ward*, *Thompson* v. *Thompson*, etc., which all hold a contrary doctrine, were not considered by them, and they decided it as a new question, and their decision is decidedly against the weight of authority. The court in that case, however, say, "That if, in the conveyance, there are words importing that the grantee will pay the debt, he is deemed to have entered into an express undertaking to do so, although he does not sign or seal the instrument. The acceptance of a deed containing such language is evidence that he has promised to do what the deed says he is to do." Now I have shown, by the cases above cited, that the legal effect of this clause is what I claim. Comstock then, by accepting said deed, has promised to indemnify his grantor, and consequently, on the authority of this case, we have the right to this action.

Mr. JUSTICE BREESE delivered the opinion of the court:

The facts of this case, as shown by the record, are briefly these: Heman Baldwin being the owner of certain lots of ground in the city of LaSalle, on the 13th of July, 1857, executed and delivered to Mrs. Ann C. Wilson a bond for a deed of the same, on certain money considerations thereafter to be paid, for which he received the notes of Mrs. Wilson. The first note was duly paid, and two hundred dollars paid on the third note. On the 15th of March, 1860, Wilson being in default, Baldwin conveyed the lots to Messrs. Dean & Blanchard, and assigned the [*547] over-due notes of Wilson to them. Dean & Blanchard, on the 2d of December, 1861, conveyed the premises to the defendant in error, by quit claim deed for the consideration of sixty dollars, and at the same time delivered the second and third notes of Wilson to him.

Previous thereto, Mrs. Wilson and her husband, James H. Wilson, on or about the 18th of December, 1858, for a valuable consideration, by warranty deed duly executed and acknowledged, conveyed the premises to the plaintiff in error, and delivered him the title bond of Baldwin and the first note which they had paid. This deed recites that "it was and is subject by the terms thereof to the said bond." The language of the deed is, "subject, nevertheless, to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named."

The bill is filed to compel plaintiff in error to pay these outstanding notes of Mrs. Wilson, and it is elaborately and ably argued by the defendant's counsel, that this obligation rests upon the plaintiff in error, and so the Circuit Court decreed. This is the only important question presented by the record.

There is no sufficient proof that the plaintiff in error ever cov-

enanted or agreed to pay these notes when he took the deed from Wilson and wife. The only pretense for such claim, seems to arise from the language used in the deed from Wilson and wife to the plaintiff in error, "subject, nevertheless, to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named."

The defendant in error has cited many cases supposed to be authority on this point, which we have examined.

The first case of *Townsend* v. *Ward et al.*, 27 Conn., 610, was a case of exchange of lands, one parcel being incumbered by a mortgage of twelve thousand dollars. In the deed for the land thus incumbered, is this clause, "which said mortgage, the said K. hereby assumes and agrees to pay, as part of the consideration money named herein." K., the purchaser, went into possession and exercised acts of ownership over the land from [*548] April to November, without any suggestion of any objection on his part to the terms of the deed. In November, he returned the deed to the grantor, stating that he refused to accept it, and should not perform the contract on his part. The court held him to a compliance, on a bill filed for that purpose, deciding that the retention of the deed so long a time was an acceptance of it. And the court also said where land is conveyed subject to a mortgage, the amount of which is allowed to the purchaser by a reduction from the price of the land, the law implies a promise on his part to indemnify the grantor against the mortgage debt.

This case is wholly variant from the case before us, as there was no agreement to pay the outstanding notes, nor were they considered in fixing the price of the lots. And at any rate, if there be any obligation whatever resting on the plaintiff in error, it is to his grantors, Wilson and wife, and not to the defendant in error.

Halsey v. *Reed*, 9 Paige, 452, is a similar case, where there was an agreement to pay off the mortgage and its amount deducted from the purchase price.

All the cases cited on this point are to the same effect. Where the payment of an outstanding mortgage is part of the purchase price of the land, the law will imply an agreement to pay it. This case is entirely different. Here a title bond was executed, and the plaintiff in error, the grantee of the holder of this bond, took the lots subject to that bond, that is to say, on paying the obligee in the bond he could compel the execution of a deed to him. This is the whole extent of this clause in the deed from Wilson and wife to plaintiff in error. He is told the legal title is in Baldwin. Now we sell to you with that understanding, and if you pay Baldwin the balance due him, you will obtain the legal title. Baldwin's title bond was not an outstanding incumbrance on the lots in any legal sense which the purchaser from Wilson

was bound, *nolens volens*, to discharge. Wilson merely sold his bargain to the plaintiff in error, and he had the option to [*549] pay the bond or not, as his interests might prompt. If he does not pay the notes, he can get no title to the lots, and that is the whole sum and substance of it. If A bargains with B to pay him one thousand dollars for a piece of land, at a future day, until A does pay, he cannot compel B to convey, and the same is the condition of the assignee or grantee of A.

We can perceive no principle of law, justice or equity requiring the plaintiff in error to pay these notes. Because he has taken a deed for the premises subject to the terms of a title bond, and without any promise to pay them, there can be no rule of law subjecting him to their payment. By taking the deed of the Wilsons, he stepped into their shoes, and on payment of the notes, he could compel a deed. This is the attitude in which he is placed. Taking a deed "subject to an outstanding mortgage," creates no personal liability on the grantee to pay off the incumbrance, unless he has specially agreed so to do, or the amount of the mortgage has been deducted from the purchase price. This is the extent to which the authorities cited go, and no farther. The land is the primary fund between all the parties, for the payment of the debt secured by it.

That part of the decree which requires the plaintiff in error to pay the balance of the purchase money, if any remains due after a sale of the lots, is reversed, and the decree will stand simply for a sale of the premises to pay the purchase money, they being subject to such lien. The decree is, therefore, modified.

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1. Where a party who is sued as a corporation seeks to raise the question whether the defendant is a corporation, upon matter *dehors* the record, the question is one to be presented by plea in abatement and not by motion. *American Express Co.* v. *Haggard*, 465.

PLEA MUST GIVE A BETTER WRIT.

2. In an action against the American Express Company, sued as a corporation, a plea in abatement was filed in the names of "Johnston Livingston, William G. Fargo, Henry Wells and others," admitting that they, "together with others," were doing business under the name by which they were sued, but denying that the company was a corporation. The plea was held bad, because it did not give the plaintiff a better writ. Ibid, 465.

3. It should have set forth who were the "others" with whom Livingston, Fargo and Wells say they were doing business, under the name of the American Express Company, in order that the plaintiff might know against whom to bring his suit, if the plea should prove to be true. Ibid, 465.

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1. *Respecting her separate property.* A husband may act as the agent of his wife, in the control and management of her personal property, either generally, or under special instructions. *Brownell* v. *Dixon*, 197.

2. *But he must appear to act in that character.* She should be careful, however, to see that her husband is acting, in truth and in fact, in that character, as very slight circumstances may, in certain cases, be sufficient for a jury to infer, that the property he is managing is really his own, and not that of his wife. Ibid, 197.

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3. *What constitutes.* A party assuming to act as the agent of his father, who was the owner of a mowing and reaping machine, sold a half interest in the machine. For two years thereafter, the purchaser and the original sole owner continued to use the machine as joint owners, the former paying one-half of the repairs, and his rights as the owner of one-half being constantly asserted, and as far as appeared, never denied until about the close of that period. *Held*, that under these circumstances, independently of the agent's authority, his act must be considered as having been ratified. *Swartwout* v. *Evans*, 442.

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4. *Repudiation by principal.* A party was employed as an agent to sell certain real estate belonging to his principal. The agent negotiated a sale as directed by a verbal agreement, which the principal afterwards repudiated. Subsequently, the agent executed a written instrument to the purchaser, as evidence of the sale, upon the terms stipulated in the prior verbal agreement. *Held*, that when the agent found his principal had repudiated the sale, although the repudiation may have been improper, his functions as an agent, so far as regarded that sale, were at an end, and he had no right afterwards, under pretense of protecting the purchaser, or to embarrass his principal, to give the purchaser the written contract. *McEwen* v. *Kerfoot*, 530.

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2. *Dismissal on motion of appellee, for want of prosecution.* And in such case, when the papers are duly sent up to the Circuit Court, the cause docketed, and called in order for trial, and no person appearing to prosecute the appeal, it is not error to dismiss the appeal on motion of the appellee, although he was not served with notice of the appeal. Ibid, 372.

3. *Application of the act of February* 22, 1861. The act of February 22, 1861, providing "that in all cases of appeals from justices of the peace, perfected ten days before the commencement of the term in appellate court,

APPEALS—*Continued.*

the appearance of the appellee may be entered in writing, and be filed among the papers of the case:" and that "if such appearance is so entered ten days before the commencement of the term, the case shall stand for trial at said term," does not change the rule as above laid down, in a case conditioned as this is. Ibid, 372.

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1. *As distinguished from a guaranty.* An endorsement upon a promissory note by the payee, in these words: "I guarranty the collection of the within note," is nothing more nor less than a simple assignment, and neither increases nor diminishes the liability of the endorser. *Judson* v. *Gookwin*, 286.

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2. *When the legal title does not pass.* One to whom a note is assigned by an instrument which does not operate to pass the legal title, occupies the same position as the payee, and holds the instrument subject to the same defenses. *Peck* v. *Bligh et al.*, 317.

WHO MAY ASSIGN A NOTE.

3. *Only the one holding the legal title.* A note for railway stock, payable to the president of the road individually, and not in his official capacity, can be assigned, so as to give the holder the rights of an assignee, only in his name. In no other way can the legal title pass. Ibid, 317.

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4. *To pass the legal title, and cut-off equities of the maker.* In such a case, a bond executed by the company, under its corporate seal, and purporting to guarantee to the holder thereof, the payment of the note at a different time and place from those specified in the note itself, and also providing that the note shall be transferred only in connection with the bond, is not such a guarranty of the note as will pass the legal title, and cut off the equities of the maker. The bond is the principal instrument in the hands of

ASSIGNMENT—*Continued.*

the holder, and the note but the incident. The assignment is qualified, and should put purchasers on their guard. Ibid, 317.

5. The only assignment which will cut off the equities of the maker of the note is one made in conformity with the Statute, and passing the legal title. Ibid, 317.

ASSIGNEE OF NOTE TAINTED WITH USURY.

6. *When assignment is as collateral security for a pre-existing debt, as to a part of the note.* If a note tainted with usury is assigned by the payee to a creditor as collateral security for a pre-existing debt, he is a holder for a valuable consideration, but only to the extent of the debt due him. The same defense may be made to the residue of the note as if it had not been assigned. *Saylor et al.* v. *Daniels*, 331.

7. *When the note is assigned before maturity.* If a note, drawing ten per cent. interest on its face, is assigned before maturity, for a valuable consideration, and without notice, the maker can not set up as a defense, under the act of 1849, that it was not given for money loaned. *Hemenway* v. *Cropsey*, 357.

8. There is no substantial difference between the acts of 1845 and 1849, as to the defense of usury, except as to the extent of the forfeiture. Neither act makes the contract void, and under neither act can the defense of usury be made against the innocent assignee of a note who has taken it before maturity, and without notice, for a valuable consideration. Ibid, 357.

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9. *If diligence be shown.* When the payee of a note endorses it: "I guaranty the collection of the within note," he is liable if due diligence to collect the note is shown. *Judson* v. *Goodwin*, 286.

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FOR MONEY HAD AND RECEIVED.

2. *When it will lie, and when not.* When a party executes a mortgage to secure a sum of money which the mortgagee promises to pay to a third person upon a debt of the mortgagor, if the mortgagee refuses to pay the debt, the mortgagor, the mortgage being unpaid, can only recover for his failure so to do, by a suit brought upon the special contract. *Town* v. *Wood*, 512.

3. But the mortgage being paid, and the mortgagor having also been obliged, himself, to pay the debt which the mortgagee agreed to pay for him, he has a right to treat the money which went into the hands of the mortgagee in consideration of his undertaking to pay the debt, as received

ASSUMPSIT—*Continued.*

by the mortgagee to his use, and to recover it back in an action for money had and received, the consideration upon which it was received having wholly failed. In such case, it is not necessary to declare specially. *Town* v. *Wood*, 512.

4. *Whether the money must actually be paid.* In this case, the mortgage was not actually paid in money, but in a purchase of the mortgaged premises by the mortgagee from a subsequent grantee of the mortgagor, it was put in at its face as part payment for the land. Yet this was the same thing as though the mortgage had been paid in money, and the action for money had and received would lie at the suit of the mortgagor upon the failure of the consideration for which the mortgage was given. Ibid, 512.

BAILMENT.

GRATUITOUS BAILMENT.

1. *What constitutes.* He who borrows the horse of another, for use, without compensation, is a gratuitous bailee. *Bennett* v. *O'Brien*, 250.

2. The loan of the use of domestic animals necessarily involves their keeping, and the expense thus incurred by the borrower is not a compensation to the lender which changes the gratuitous character of the bailment. Ibid, 250.

3. *Degree of care required.* A gratuitous bailee must exercise extraordinary care. Ibid, 250.

BANKING LAW.

ISSUING PAPER NOT PAYABLE ON DEMAND.

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3. *And the propriety of instructions.* The appellate court cannot pass upon instructions, if they are not brought into the record. Ibid, 43.

4. *Affidavits.* Affidavits of a sheriff and clerk concerning an alleged irregularity in summoning a petit jury, will not be considered in the Supreme Court unless they are made a part of the record by bill of exceptions. *Murphy* v. *The People*, 447.

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CARRIERS.

RESPONSIBLE FOR THE HONESTY OF THEIR AGENTS.

An express company is a common carrier, and must be held to the strictest responsibility for the honesty of its agents, and if one of them abstract a parcel while in the act of delivering it, the company will be liable. *American Express Co.* v. *Haggard*, 465.

CERTIFICATE OF DEPOSIT.

IS A PROMISSORY NOTE. See PROMISSORY NOTES, 1.

WHETHER IT MUST BE RETURNED. Same title, 2, 3, 4.

CERTIORARI.

IN REMOVAL OF CASES FROM JUSTICES' COURTS.

When relief may be had thereby. Where a petition for a *certiorari*, under the Statute, states that the petitioner had been summoned as garnishee in a number of cases, before the same Justice of the Peace, and was discharged after examination, by the justice, and had no knowledge a judgment was rendered against him until it was too late to take an appeal, and that the judgment was unjust, showing wherein he can have relief by writ of *certiorari*. *McNerney* v. *Newberry*, 91.

CHANCERY.

PLEADING IN CHANCERY.

1. *Allegations of fraud and usury*, should not be general, but the facts distinctly stated, on which the charges are based. *Newell et al.* v. *Supervisors of Bureau County et al.*, 253.

WHEN THE ANSWER IS TAKEN AS TRUE.

2. *When the party abides by his exceptions thereto.* If a party to a suit in chancery chooses to abide by his exceptions to an answer to his cross-bill, and which are disallowed, the answer is properly taken for true. *Prettyman et al.* v. *Barnard*, 105.

RE-HEARING IN CHANCERY.

3. *Is discretionary.* A motion for a re-hearing in chancery is addressed to the discretion of the court, and error cannot be assigned on refusing it. Ibid, 105.

PROOF OF SERVICE OF PROCESS.

4. *By recital in the decree.* Where the decree recites the fact that process was served, and there is nothing showing it was not served, it will be considered as served, unless the party will file an affidavit that he was not served. Ibid, 105.

BILL TO REDEEM.

5. *By one creditor from another.* The M. & M. Bank recovered a judgment in the name of King, its attorney, in November, 1853, against Davidson, who held a tract of land under a perpetual lease with the right to purchase the fee at a fixed price. In January, 1854, Dennis recovered judgment against Davidson. In February, 1854, the bank, having an unrecorded assignment from Davidson, older than either judgment, of his lease, paid the purchase price and received a deed from the owner of the fee, and then recorded the assignment and deed. In May, 1857, the land was sold under the King judgment. In August, 1858, Dennis recovered another judgment against Davidson, and redeemed from the sale under the King judgment and obtained a sheriff's deed. Dennis had sold in May, 1856, under his first judgment, but had not taken out a deed. He now filed a bill to redeem the legal title from the M. & M. Bank, and its assignees. *Held*, that he could redeem by paying what the bank had paid for the legal title, and interest and taxes. *Niantic Bank et al.* v. *Dennis*, 381.

SPECIFIC PERFORMANCE.

6. *By vendee of land against his vendor.* When a vendee has paid the purchase money, entered into possession under the contract, and made lasting and valuable improvements, he has a right to compel a conveyance; nor

CHANCERY—*Continued.*

will the vendor be exonerated therefrom, by showing that, as between his vendee and some other person, there are unadjusted equities. *Gibbs* v. *Blackwell et al.*, 191.

7. *By purchaser from vendee as against the first vendor.* When a vendee who has contracted for the purchase of land, has sold it to another, the latter will be entitled to receive from the first vendor the same kind of deed which he contracted to give his vendee, if the latter purchaser elects to resort to him for a conveyance. Ibid, 191.

REMOVING A CLOUD UPON A TITLE.

8. A void decree confers no power upon an executor to sell the lands of his testator to pay debts, and his grantee, as well as subsequent purchasers of the property, are chargeable with notice, and a court of equity will set such conveyance aside, as a cloud upon the owner's title. *Morris et al.* v. *Hogle et al.*, 150.

9. Although a levy upon lands is void by reason of uncertainty in the description of the premises, yet when there has been a sale and a deed in pursuance of such a levy, and the party claims title under them, he thus creates a cloud upon the owner's title, which a court of chancery will remove. *Stout et al.* v. *Cook*, 283.

DEMURRER TO THE BILL.

What it admits. See DEMURRER, 2.

PRESERVATION OF TRUSTS.

When one of several trustees refuses to act. See TRUSTS, 2.

PROTECTION AFFORDED AN EQUITABLE TITLE.

As against a legal title subsequently acquired, with notice. See GOVERNMENT LANDS, 1.

SWORN ANSWERS IN CHANCERY.

Degree of evidence required to overcome them. See PLEADING and EVIDENCE, 7.

WRIT OF ASSISTANCE.

When it will issue, and when not. See WRIT OF ASSISTANCE.

CHATTEL MORTGAGES.

OF THE POSSESSION OF THE PROPERTY.

1. *When the mortgagee must take possession, in order to preserve his lien.* Where a chattel mortgage provided that, on the happening of certain contingencies, the notes secured by it, though not due by their terms, should become due and payable, and the mortgagee *may elect* to take possession of the mortgaged property, he is not compelled to take possession in order to preserve his lien, but has the election either to treat the notes as due, or let them stand on their original terms, as he may desire. *Barbour et al.* v. *White et al.*, 164.

2. When several notes, maturing at different dates, are secured by a chattel mortgage, and the conditions of the mortgage are broken on default in payment of any one of the notes, it is nevertheless optional with the mortgagee to take possession on the first default, or to await the maturity of the last note. Ibid, 164.

3. *Diligence required of mortgagee in bringing suit for possession.* Where notes, payable in the city of New York, are secured by a chattel mortgage on property in Chicago, the agent of the mortgagee in Chicago would have until the next day after being advised of non-payment in due course of mail, to sue out a writ of replevin, provided the advice of non-payment is sent by mail without delay on the part of the person sending. In such cases it is not necessary to resort to the telegraph in order to constitute diligence. Ibid, 164.

ASSIGNEE OF MORTGAGE.

4. *May maintain replevin.* The assignee of a chattel mortgage may,

CHATTEL MORTGAGES—*Continued.*

upon condition broken, maintain an action of replevin for the recovery of the mortgaged property. *Barbour et al.* v. *White et al.*, 164.

5. *Takes subject to certain equities.* Although the assignee of a mortgage takes it subject to all equities between the original parties, he does not take subject to the latest equities of third persons of which he had no notice. Ibid, 164.

CLERKS.

OF THEIR FEES.

For keeping indices to their court records. See FEES.

CLOUD UPON TITLE.

WHAT CONSTITUTES.

And when a court of chancery will interpose to remove it. See CHANCERY, 8, 9.

COLLATERALS.

ARE NOT PAYMENT. See PAYMENT.

COLOR OF TITLE.

WHAT IS COLOR OF TITLE.

Is a question of law. Blanchard et al. v. *Pratt*, 243.

CONDITIONS.

CONDITIONS PRECEDENT, ETC.

Rule of construction. See CONTRACTS, 4.

CONFLICT OF LAWS.

CONTRACTS MADE IN ONE COUNTRY TO BE PERFORMED IN ANOTHER.

1. *Need not be of such character as to be enforcible in both countries.* The laws of every country allow parties to enter into obligations with reference to the laws of the country where such obligations are to be performed; and although such obligations may not be in accordance with the laws of the country where they are made, as regards obligations to be performed in that country, they may be strictly in accordance with such laws as to obligations to be performed in other countries. *Adams et al.* v. *Robertson et al.*, 45.

2. *But they must be in accordance with the laws of one or the other.* But a limitation in the laws of all nations of the right to enter into contracts to be performed in other countries requires that they shall be in accordance with the laws of the country where they are made, or else in accordance with the laws of the country where they are to be performed. Ibid, 45.

3. *From the laws of which country the rights to be enforced are derived.* The rights enforced by courts where contracts are made in one country to be performed in another are those given by the law of the country where the contract was made. Ibid, 45.

4. *Are enforced as a matter of comity, only.* And such rights are enforced in the country where the contract is to be performed, not as a matter of right, but as a matter of comity extended toward the country where the contract was made. *Adams et al.* v. *Robertson et al.*, 45.

5. *When the contract depends upon the law of the country where it is made.* Where a contract is made in one State for the payment of interest in another, at a higher rate than is allowed by the laws of either State, the fate of the contract depends upon the laws of the State where it was made. It is the laws of that State that have been violated. Ibid, 45.

CONSIDERATION.

WHEN NOT NECESSARY.

1. *Upon a guaranty of a note by the payee.* Though a guaranty of a note is made long after the execution of the note itself, if made by the payee, no consideration therefor need be averred. *Judson* v. *Gookwin*, 286.

CONSIDERATION—*Continued.*

WANT OF CONSIDERATION.

2. *What constitutes.* No plea of want of consideration can be sustained to a note given for a portion of the swamp lands sold by a county, on the ground that the lands have not been reclaimed, and a system of drainage established and carried out. *Newell et al.* v. *Supervisors of Bureau County et al.*, 253.

FAILURE OF CONSIDERATION.

3. *What constitutes.* A, having purchased land from the owner, but not having completed the payment of the purchase money, or obtained a deed, sold the same to B, and stipulated in the contract of sale that he would convey his right, title and interest, with full covenants of warranty, on the payment by B of the notes given by him to A, for the purchase money. There was no default of payment on the part of B, but A, failing to make his own payments to the holder of the legal title, the latter declared a forfeiture of A's contract, and re-sold the land to B, who then refused to pay the notes given by him to A. The assignee of the unpaid notes brought suit. *Held*, that the foregoing facts constituted a good defense against the holder of the notes, unless he stood in the position of an innocent assignee for a valuable consideration. *Lull et al.* v. *Stone*, 224.

WHO IS A HOLDER FOR A VALUABLE CONSIDERATION.

Assignee of a note, which is assigned as collateral security for a pre-existing debt. See ASSIGNMENT, 6.

WHAT IS A SUFFICIENT CONSIDERATION.

Sale of property by a debtor to his creditors in payment of debts. See FRAUDULENT CONVEYANCES, 3.

CONSOLIDATION OF ACTIONS.

HOW FAR DISCRETIONARY.

1. The Circuit Court may, in its discretion, consolidate actions between the same parties; but the refusal so to do cannot be assigned for error unless the discretion has been greatly abused. *Miles et al.* v. *Danforth*, 156.

THE PARTIES MUST BE THE SAME.

2. Where the plaintiffs in two suits are different, the court has no authority to consolidate on a motion of the defendants alleging that the suits make only one cause of action. Ibid, 156.

IDENTITY OF INTEREST CANNOT BE SHOWN.

3. *If parties are different.* Where the plaintiffs are different persons, the court will not, upon a motion to consolidate, allow an allegation of identity of interest to be established by affidavit. Ibid, 156.

CONSTITUTIONAL LAW.

LEGISLATIVE POWER.

1. *Retrospective legislation, cannot affect rested rights.* The legislature, by retrospective enactment, is powerless to divest an individual of a vested right; but may require that acts shall be performed in the future, and declare that their omission shall subject an individual to the forfeiture of such a right. *Conway* v. *Cable et al.*, 82.

2. *Curative legislation—illegal tax sale.* Where the officers, conducting a tax sale, omit essential acts, rendering it invalid, the legislature are powerless to cure the defect, and render the sale valid. And when such officers, by an agreement with purchasers to receive a portion only of the taxes due, at the sale, such agreement being illegal, a sale under the agreement is also illegal; and is not rendered valid by a subsequent law declaring the agreement and sale valid and binding. Ibid, 82.

3. The act of the 21st of February, 1861, declaring that certain defenses shall not be made, to tax deeds executed after the adoption of the law, until the redemption money is tendered, does not operate upon sales made before its passage, but, if at all, only on subsequent tax sales. Ibid, 82.

4. *Legislature cannot impose unreasonable terms to the assertion of a*

CONSTITUTIONAL LAW—*Continued.*

right. When a right has become vested, the legislature has no power to impose penalties, or terms as a condition, to the assertion of the right. Nor have they the power, where an individual has permitted his land to pass to a void sale for taxes, to enact that he shall not be allowed to assert his paramount title, as a defense against a tax title acquired at such a sale, without paying the redemption money. Ibid, 82.

CONSTRUCTION OF CONTRACTS. See CONTRACTS.

CONTINUANCE.

UPON AMENDMENT OF DECLARATION.

When allowed. A party complaining that a continuance was not granted on a declaration being amended, must show what the amendments were, and wherein they were material. It is only when material amendments are made, changing, in some decree, the character of the claim, that a continuance is allowed. *Eames et al.* v. *Morgan et al.*, 260.

CONTRACT.

WHAT CONSTITUTES A CONTRACT.

1. *As distinguished from a notice—endorsement upon a free railroad pass, restricting the liability of the company, in case of injury.* See RAILROADS, 3.

CONSTRUCTION OF CONTRACTS.

2. Where an absolute deed was made to the president of a bank who thereupon gave back a defeasance undertaking to reconvey upon the payment of what the debtor owed the bank and another creditor, the presumption is that the bank and the other creditor were to share *pro rata* in the proceeds of the security. *Adams et al.* v. *Robertson et al.*, 45.

3. *Of covenant for repairs by a lessor—within what time to be performed.* Where a lessor, for a term of five years, covenants to paint the building, to erect a stable, and lay a side track leading to a cattle yard, connected with the hotel, and no time is specified when such repairs shall be made, the law will presume that it was to be done for the benefit of the lessee, and in a reasonable time. *Lunn et al.* v. *Gage*, 19.

4. *Whether a corenant is dependent or independent.* The true rule of construing covenants, is to hold them dependent or independent, according to the intention of the parties. And where a covenant seems to be dependent, if the parties act under it so as to render it clear that they regarded as independent, such action affords a means of ascertaining their intention, when it was entered into by the parties. Ibid, 19.

5. *In reference to a fraction of a day, as to the time of performance.* When parties contract for the performance of an act during the first half of any month containing thirty-one days, they contract that it shall be performed by noon of the sixteenth day. *Grosvenor et al.* v. *Magill and Latham*, 239.

CONTRACTS MADE IN ONE COUNTRY TO BE PERFORMED IN ANOTHER.

Of the rules controlling their validity and governing their enforcement. See CONFLICT OF LAWS.

CONVEYANCES.

QUIT CLAIM DEEDS.

1. *What will pass thereby.* While a quit claim deed is as effectual to pass title as a deed of bargain and sale, still, like all other contracts, it must be expounded and enforced according to the intention of the parties, so as to pass only such land as would be properly embraced in the language used. *Hamilton* v. *Doolittle et al.*, 473.

2. *As to prior unrecorded deeds.* If the words used in the quit claim deed indicate an intention on the part of the grantor to pass only such land as he owns at the time of its execution, then lands embraced in a prior valid deed will be held to be reserved from its operation, and will not pass there-

CONVEYANCES—*Continued.*

by, although the prior deed remains unrecorded. *Hamilton* v. *Doolittle et al.*, 473.

3. *Application of the rule in this case.* In this case, the words used to describe the property intended to be conveyed by the quit claim deed were as follows: "All lots, blocks, land and fractional blocks, or any interest therein, in the town of Pekin, that I have; also all my right and interest, or in anywise appertaining, together with the right of ways. This deed is intended to convey all the interest the said grantor has in the town of Pekin." *Held*, that the language only embraced such land as the grantor owned at the time of the execution of the deed, and would not affect the title under a prior valid conveyance, although such prior conveyance remained unrecorded. Ibid, 473.

4. *As regards a prior deed which is void or voidable.* But a prior deed which is void or even voidable is not regarded as embraced in such a reservation in a subsequent quit claim deed; and the subsequent deed will, in such case, be upheld, as binding and sufficient to pass the title as against the prior conveyance. Ibid, 473.

5. *As against a prior deed which is imperfectly acknowledged and cannot be proven.* Or where the prior deed is so insufficiently executed, as regards the certificate of acknowledgment, that its execution cannot be proven thereby, and its execution cannot be otherwise proven so that it can be admitted in evidence as a conveyance, it cannot be held to constitute a conveyance, and so will not control the operation of a subsequent quit claim deed which was designed to pass all the lands owned by the grantor at the time of its execution. Ibid, 473.

CORPORATIONS.

LIABLE FOR ACTS OF AGENTS.

1. *To what extent.* All corporations act by and through their agents, for whose acts, in the line of their business, the corporation appointing them is held liable. A corporation will be held responsible for the unlawful acts of its employees or agents, which include willful injuries, or injuries resulting from gross negligence. *Illinois Central Railroad Co.* v. *Read*, 484.

2. The distinction attempted to be made by the New York courts, between the negligence of the corporation, acting through its president and board of directors, and the negligence of their employees or servants and agents, is not recognized in this State. Ibid, 484.

COSTS.

ON RE-HEARING IN THE SUPREME COURT.

1. The only additional costs proper to be taxed upon the re-hearing of a cause in the Supreme Court are the costs of the orders made necessary thereby, and costs of filing any papers incident to the re-hearing. *Swartwout* v. *Evans*, 442.

BOND FOR COSTS.

2. *When to object for want of it.* The objection, that no bond for costs was filed, the plaintiff being non-resident, comes too late after answer filed, and if not made at the proper time, it will be considered as waived. *Dunning et al.* v. *Dunning et al.*, 306.

COVENANTS.

DEPENDENT AND INDEPENDENT.

Rule of construction. See CONTRACTS, 4.

COVENANTS FOR TITLE.

OF A SUBSEQUENTLY ACCRUING TITLE.

Where a party has conveyed land by deed with covenants for title, his liability upon his covenants will not necessarily cease to exist upon the failure of the title resulting from one subsequently accruing. Such would, no doubt, be the case, if the title failed from the acts or omissions of the grantee or other parties; but it could not be so where the title has failed by

COVENANTS FOR TITLE—*Continued.*

the action of the grantor himself, as in a subsequent sale and conveyance of the land whereby the title under a prior unrecorded deed would be defeated. *Hamilton* v. *Doolittle et al.*, 473.

CREDITORS.

OF THEIR RELATIVE RIGHTS.
Construction of a contract. See CONTRACTS, 2.

OF THEIR RIGHTS AS AGAINST A FACTOR'S LIEN. See FACTOR, 3.

WHEN ONE MAY REDEEM FROM ANOTHER.
In equity. See CHANCERY, 5.

CRIMINAL LAW.

MALICE.

1. *When implied—burthen of proof.* Upon the trial of a party upon the charge of murder, it being proven that he inflicted the mortal wound, the law implies the malice, and it devolves upon him to show the justification or mitigation, to reduce it from murder or to obtain an acquital, unless the whole circumstances show that it was not accompanied with malice. *Murphy* v. *The People*, 447.

JUSTIFIABLE HOMICIDE.

2. *What constitutes.* It cannot be said that a man doing all within his power to take the life of another with a gun, is justified in so doing, because the person assailed endeavors simply to dispossess the assailant of the weapon as a means of preserving his own life, although it may have contributed, unintentionally, to the discharge of the gun. Ibid, 447.

FORMER CONVICTION.
When not a bar. See FORMER CONVICTION.

DEATH OF A PARTY TO A SUIT.

AFTER DEATH OF A SOLE PLAINTIFF.
A default cannot be taken against the defendant before the representative of the plaintiff is made a party. *Barbour et al.* v. *White et al.*, 164.

DEBTOR AND CREDITOR.

OF FRAUDULENT CONVEYANCES. See FRAUDULENT CONVEYANCES, 2, 3.

DECEIT.

FALSE AFFIRMATION. See FRAUD, 1, 2.

CONTRACT NOT INVOLVED.
In an action for deceit. See PLEADING AND EVIDENCE, 3.

DECREE.

NEED NOT BE SIGNED BY THE JUDGE.

1. The judge rendering a decree in a suit for partition is not required to sign his name to it; the entry of the decree on the record by the clerk gives it validity. *Dunning et al.* v. *Dunning et al.*, 306.

DECREE OF SALE OF PROPERTY.

2. *Notice should be prescribed in the decree.* It is much the better practice for the Chancellor, in ordering sales of property, to prescribe the time and manner in which notice thereof shall be given, as well as the terms and conditions of the sale, and not leave these to the discretion of the Master. *Sowards* v. *Prichett*, 517.

WHEN VOID.

3. *When there is no jurisdiction of the person, in proceedings by an executor to sell land to pay debts.* See EXECUTORS AND ADMINISTRATORS, 2, 3.

AMENDATORY DECREE.

4. *Cannot cure a void decree.* Where a court renders a decree without

DECREE—*Continued.*

jurisdiction of the person, and which is therefore void, it will not be cured or rendered binding by a subsequent amendatory decree, rendered without such jurisdiction. *Morris et al.* v. *Hoyle et al.*, 150.

RECITALS IN A DECREE.

Of service of process. See CHANCERY, 4.

DEFAULT.

AFTER DEATH OF A SOLE PLAINTIFF.

Cannot be entered against defendant until representative of the plaintiff is made a party. *Barbour et al.* v. *White et al.*, 164.

DELIVERY.

POSSESSION OF PERSONAL PROPERTY.

1. *What amounts to, as between the parties.* If the vendor of a reaping machine give to the purchaser, who has executed his note for the purchase money, an order on the person having the custody of the machine to deliver it to the purchaser, the giving of the order is a delivery of possession, and, in the absence of fraud, the order can not be recalled. *McCormick et al.* v. *Hadden*, 370.

DELIVERY OF GOODS.

2. *By an express company—what constitutes.* A delivery of a package by an express company, to discharge the company, must be actual and *bona fide*, and not merely formal. *American Express Company* v. *Haggard*, 465.

3. So, if the agent of the company abstracts a parcel while in the act of delivering it, it is no delivery, and the company will be liable even though a receipt be signed and the form of delivery gone through, by the agent's laying the property for a moment out of his hands. Ibid, 465.

DEMAND.

WHETHER NECESSARY OR NOT.

1. *In case of a certificate of deposit; or a promissory note payable on demand; or payable at a particular time and place.* See PROMISSORY NOTES, 4, 5.

BY ONE JOINT OWNER OF ANOTHER.

2. *Of the form of the demand.* Where one of two joint owners of personal property demands of the other, not the joint use and possession, as joint owner, but the property as sole owner, the latter is at entire liberty to disregard such a demand. *Swartwout* v. *Evans*, 442.

3. To make a demand available under such circumstances, the party making it should demand the equal enjoyment of the property as joint owner. Ibid, 442.

AT WHAT TIME A DEMAND SHOULD BE MADE.

4. *Before suit brought.* Where it is sought, on the trial of an action of trover, to establish a demand by the plaintiff of the property in question from the defendant, to make the demand availing, it must appear to have been made before the commencement of the suit. Ibid, 442.

DEMURRER.

WHEN NECESSARY.

1. *To test sufficiency of a pleading.* Only by a demurrer in the court below, or by a motion in arrest of judgment, can the sufficiency of a declaration be brought before the Supreme Court. *Cooke* v. *Orne*, 186.

2. *When necessary in order to have the advantage of a defect in a pleading.* See PLEADING, 9.

WHAT A DEMURRER ADMITS.

3. *In chancery.* A general demurrer to a bill in chancery admits all the facts in the bill which are properly pleaded, but not inferences of law from the facts. *Newell et al.* v. *Supervisors of Bureau County, et al.*, 253.

JUDGMENT ON DEMURRER. See JUDGMENTS, 2.

DEPENDENT AND INDEPENDENT COVENANTS.
THE RULE OF CONSTRUCTION. See CONTRACTS, 4.

DEPOSITIONS.
OF OBJECTIONS THERETO.
When they must be taken. See PRACTICE, 7.

DESCRIPTION.
OF PROPERTY LEVIED ON.
When void for uncertainty. See LEVY, 2.

DILIGENCE.
IN CASE OF A CHATTEL MORTGAGE.
1. *Diligence required of mortgagee in taking possession of the property, or in bringing suit for that purpose.* See CHATTEL MORTGAGES, 1, 2, 3.
IN SEARCHING FOR PAPERS.
2. *To admit secondary evidence of their contents.* See EVIDENCE, 9, 10.
BY AN ASSIGNEE TO HOLD AN ENDORSER. See ASSIGNMENT, 10, 11.

DISCRETIONARY.
OF MATTERS THAT ARE DISCRETIONARY.
1. *Setting aside order dismissing an appeal.* The Circuit Court has a discretion to grant or refuse to set aside an order dismissing an appeal for want of prosecution, and its action on a motion for that purpose cannot, therefore, be assigned as error. *Allen* v. *City of Monmouth*, 372.
2. *Dismissal of cause in the Supreme Court, for want of abstracts.* See PRACTICE IN THE SUPREME COURT, 1.
3. *Granting a rehearing in chancery.* See CHANCERY, 3.
4. *Consolidation of actions.* See CONSOLIDATION OF ACTIONS, 1.
5. *Withdrawal of pleadings.* See PRACTICE, 9.

DISMISSAL.
FOR WANT OF JURISDICTION.
1. *When not proper.* See PRACTICE, 1.
DISMISSAL OF APPEALS.
2. *For want of prosecution, when no summons has been issued.* See APPEALS, 2, 3, 4.
3. *Set aside, only when merits are shown.* See PRACTICE, 3.

DOWER.
TO WHAT CHARACTER OF ESTATE IT ATTACHES.
1. *To an equitable estate of inheritance.* Lands were bought and given in trust by the owners, in such manner that they became personal property. Subsequently, by the consent of the owners, the first trustees conveyed to others, in trust for the owners, without any specific trust being declared. The land thus became re-converted into its original character of real estate, creating in the *cestuis que trust* an equitable estate of inheritance, which became at once subject to the dower right of their wives. *Nicoll* v. *Miller et al.*, 387.
HOW SUCH RIGHT MAY BE DIVESTED.
2. The inchoate right of dower having once attached, it cannot be divested in any mode except that prescribed in the Statute. No subsequent declaration of a specific trust by the *cestuis que trust* can restore the property to its former condition of personal property so as to affect the right of dower, nor by relation, change the character of the conveyance by means of which the right originally attached. *Nicoll* v. *Miller et al.*, 387.

DYING DECLARATIONS. See EVIDENCE, 20, 21.

ENTRIES OF PUBLIC LANDS.
CANCELLATION THEREOF. See GOVERNMENT LANDS, 2, 3, 4.

EQUITABLE TITLE.

As against a subsequent legal title, with notice.
How far protected. See GOVERNMENT LANDS, 1.

ERROR.

In the exercise of a discretionary power.
1. *Setting aside order dismissing an appeal.* The Circuit Court has a discretion to grant or refuse to set aside an order dismissing an appeal, and its action on a motion for that purpose, cannot, therefore, be assigned as error. *Allen* v. *City of Monmouth*, 372.
2. *Withdrawing pleadings.* See PRACTICE, 9.
3. *Consolidation of actions.* See CONSOLIDATION OF ACTIONS, 1.
4. *In the exercise of discretionary power to grant a re-hearing in chancery.* See CHANCERY, 3.

Error will not always reverse.
5. Where the action is not maintainable, in any view of the evidence, the judgment will not be reversed because the court directed the jury to find for the defendant, though such instruction was wrong in form. *Peoria Marine and Fire Insurance Co.* v. *Frost et al.*, 333.
6. If it can be seen by the appellate court that an erroneous ruling of the court below has worked no injury to the party complaining, such ruling is no ground for a reversal of the judgment. *Coursen* v. *Ely*, 338.

ESCAPE.

When officer liable therefor.
1. *In case of negligence.* An officer who negligently permits the escape of a prisoner, is liable to any person injured by his neglect of official duty. *Pease* v. *Hubbard*, 257.
2. *In bastardy cases.* An officer who negligently permits the escape of a person in his custody, on a bastardy warrant, is liable to the mother of the illegitimate child. Ibid, 257.

ESTOPPEL.

1. Where the lessee of a town lot, having erected a building thereon, supported by posts set in the ground, under a provision in the lease that he might remove all buildings at the end of the term, makes a chattle mortgage upon said building, describing it as personal property, both he, and all persons claiming under him, will be held estopped from denying that such building is personal property, as against all persons claiming under said mortgage, and if the widow of the lessee has surreptitiously acquired the possession of such building, and holds it against the purchaser under the mortgage, she cannot protect her possession against an action of replevin brought by him, by setting up the title of the landlord, or a homestead right in herself. *Ballou* v. *Jones et al.*, 95.
2. If a judgment creditor causes land belonging to the judgment debtor at the date of the judgment to be levied on and sold under an execution issued upon the judgment, he cannot, as against a purchaser at the sheriff's sale, or redeeming creditor, insist that the judgment was paid at the date of the sale, and its lien destroyed. *Niantic Bank et al.*, v. *Dennis*, 381.
3. The fact that a landlord has given his tenant notice to quit, when from the character of the tenancy no notice was required, will not commit the landlord as to the nature of the term; but he may repudiate the notice and place himself on the true ground. *Secor* v. *Pestana*, 525.

EVIDENCE.

Parol evidence.
1. *How far admissible to contradict recitals in deed.* Although parol evidence is admissible to contradict the acknowledgment in a deed of the payment of the consideration, provided it is not sought to impair the legal effect of the deed as a conveyance, yet it is inadmissible for the purpose of making the deed null. *Illinois Central Insurance Co.* v. *Wolf*, 354.
2. *On the receipt of the premium in a policy of insurance.* An insurance

EVIDENCE—*Continued.*

company cannot contradict the receipt of the premium contained in the policy for the purpose of avoiding it. Ibid, 354.

3. *To vary, contradict or explain written instruments.* Where a deed was given, absolute on its face, and a written defeasance stipulating for the payment of the money by a day named, parol proof cannot be received to vary such written agreement. *Snyder* v. *Griswold*, 216.

4. All conversations anterior to the examination of the writings are considered as merged in the writings, and they must speak the contract of the parties. *Snyder* v. *Griswold*, 216.

5. Where a bill of sale was for a "lot of empty boxes and empty barrels (not including 442 tierces and 100 barrels of salt now in the pork house) and all other movable effects now in the pork house," cannot be contradicted by evidence to prove that it was intended that fifty other barrels of salt, then in the pork house, should not be included. The bill of sale is the agreement of the parties, and it must, like other agreements, speak for itself. *McCloskey* v. *McCormick et al.*, 66.

6. *For the correction of an alleged mistake in a written instrument.* See MISTAKE, 1.

7. *To explain or contradict a receipt.* A mere receipt may be explained, or even contradicted, by parol proof. *McCloskey* v. *McCormick et al.*, 66.

8. *Where the instrument partakes both of the character of a receipt and an agreement.* A written instrument may be both a receipt and an agreement, and, in such case, the portion operating only as a receipt may be explained like any other receipt; but not so of the part which contains the contract of the parties. Ibid, 66.

SECONDARY EVIDENCE.

9. *Of contents of written instruments—diligence.* Where an instrument has never been in the custody or control of a party wishing to use it, and is of such a character that the law does not presume it to have been in his control, he will not be required to show a diligent search among his papers before giving parol evidence of its contents. *Wells et al.* v. *Miller*, 276.

10. Where it appears that the *duces tecum* clause in a subpœna would have been unavailing, there is no want of diligence in failing to insert it. Ibid, 276.

ADMISSIONS.

11. *To whom they should be made.* Where a tenant has made admissions or declarations as to the character and extent of his tenancy, they are admissible against him in a suit between him and his landlord in respect to the possession, no matter to whom they were made. It is not essential that such admissions, to be available, should be made to the party or his agent. *Secor* v. *Pestana*, 525.

12. *Proof of partnership thereby.* A partnership may be proven by evidence that each of the alleged partners had admitted its existence, but the admissions of one defendant, made in the absence of the others, are evidence against them of the existence of the partnership. *Gordon et al.* v. *Bankard et al.*, 147.

BURTHEN OF PROOF.

13. *In suit against a bailee, as to the degree of care exercised.* In a suit brought by the lender against the borrower of a horse, which died in the possession of the latter, after the plaintiff proved the character of the bailment and the death of the horse in the bailee's hands, it devolved on the latter to show he had exercised the degree of care required by the nature of the bailment. *Bennett* v. *O'Brien*, 250.

14. *In regard to the bona fides of the assignment of a note.* When promissory notes have been assigned, the presumption will be indulged that it was for value, and *bona fide*. Persons questioning the fairness of the transaction, to defeat the assignment, must prove that it was not for value, or that it was made for fraudulent purposes. *Wightman et al.* v. *Hart*, 123.

Burthen of proof in criminal cases. See CRIMINAL LAW, 1.

EVIDENCE—*Continued.*

SUBSEQUENT DECLARATIONS AND ACTS OF A VENDOR.

15. *Not admissible.* The declarations or acts of a vendor of property, which he has sold and delivered, cannot be received to prejudice the title of his vendee. *Hessing* v. *McCloskey*, 341

EVIDENCE OF FRAUD.

16. *What constitutes.* Proof that the assignor of a note was insolvent at the time he assigned it, does not prove the transfer to have been fraudulent. *Whitman et al.* v. *Hart*, 123.

17. Nor does the fact that the assignor was the nephew of the assignee prove the transfer fraudulent. Ibid, 123.

PASS BOOKS.

18. *Of what they are evidence.* Where a person in dealing with a merchant, uses a pass book which is presented to the merchant when articles are purchased, and they are entered in the book which is returned to the buyer with the goods, in an action by the merchant to recover for the goods thus sold, the pass book, it seems, is admissible in evidence for the plaintiff, but is only proper evidence to fix the amount of the goods purchased. Where the pass book was used by a third person for whose use the goods were being bought, the book would not tend in any degree to prove the goods were sold on the credit of the defendant. *Hovey* v. *Thompson & Co.*, 538.

PROOF OF HANDWRITING.

19. *By comparison.* The genuineness of a signature cannot be proved on the trial of a cause by comparing it with another signiture admitted to be genuine. *Kernin* v. *Hill*, 209.

DYING DECLARATIONS.

20. Upon the prosecution of a party on the charge of murder, the statement of the deceased was introduced as his dying declaration. As a foundation for its introduction, it was shown that the statement was taken down on the day preceding his death, and was sworn to. At the time, the wounded man expressed no opinion as to whether death was impending, except by nodding assent when told he would have to swear he had no hope of life. He had been told by his physician that he could not recover, upon his inquiry whether there was any hope. He partook of the last rites of his church before making the statement. He was under the influence of morphine, and had to be aroused sometimes to get his attention while the statement was being taken. The statement was partly voluntary, and portions of it drawn out by questions to which he sometimes answered and sometimes nodded assent. The statement was not taken down in his own language, but substantially so. He had made no disposition of his property. The statement was read to him after it was written, and he said it was substantially correct. It was regarded that the condition of mind of the declarant in regard to any hope of recovery, and the manner in which his statements were taken, entitled them to be admitted to the jury as his dying declarations. *Murphy* v. *The People*, 447.

21. But on account of his condition, his statements were not entitled to much weight, and would not, alone, sustain a verdict of guilty, even of manslaughter. Ibid, 447.

UPON CROSS-EXAMINATION.

22. *What is competent.* In an action against an express company to recover for money alleged to have been intrusted to them, but never delivered, and for which a receipt had been given by a clerk of the owner, by mistake, supposing he was receipting for other articles, the company proved by one of their agents the custom of their drivers never to deliver packages without getting a receipt, and that they always took the package to the consignee when they called for the receipt. The plaintiff, on the cross-examination, proved that it was the custom of the particular driver who had this package, to steal money parcels, and that some time after this occurrence, the company arrested him, made him surrender $850 in money and some

EVIDENCE—*Continued.*

valuable jewelry, and that the driver escaped from the officer and ran away. *Held*, that after the examination in chief, this evidence upon the cross-examination was admissible. *American Express Co.* v. *Haggard*, 465.

OF PROCEEDINGS THAT MAY BE ATTACKED COLLATERALLY.

Proceedings by executor to sell land to pay debts. See EXECUTORS AND ADMINISTRATORS, 1, 3.

EVIDENCE OF OWNERSHIP OF PERSONALTY.

Possession. See PERSONAL PROPERTY, 2.

EXECUTION.

PRESUMPTION IN REGARD TO ITS ISSUE.

Under proper authority. The presumption is, in the absence of proof, that a clerk issues an execution only under the direction of some person authorized to control the writ. *Niantic Bank et al.* v. *Dennis*, 381.

EXECUTORS AND ADMINISTRATORS.

APPLICATION FOR AN ORDER TO SELL LAND TO PAY DEBTS.

1. *Of the petition—parties' names.* It is no doubt error, to render a decree for the sale of lands of an estate to pay debts, on a petition, in a case where the names of the heirs do not appear in the petition, or in any part of the record; but that is not essential to the jurisdiction, and cannot be inquired into in a collateral proceeding. *Morris et al.* v. *Hogle et al.*, 150.

2. *There must be notice.* In all judicial proceedings, to render a judgment or a decree binding, the court must have jurisdiction of both the subject matter and the person. An order of the county court, rendered on a notice that the executor would apply at the December term of the court for license to sell real estate, to pay debts, and it is not made at that time, but the application is made and the order rendered on a petition filed, without further notice, at the next February term, is not binding on the heirs for want of notice. *Morris et al.* v. *Hogle et al.*, 150.

3. If notice of such a proceeding is not served or given to the heirs, in some mode known to the law, a decree licensing the executor to sell lands of the testator to pay debts will be void, and may be questioned in both direct and collateral proceedings. Ibid, 150.

4. *Of the extent of the power to be conferred.* It is error for the court to license an executor to sell so much real estate as he may deem for the best interest of the estate. He should be licensed to sell as much as may be required to pay the debts of the estate. Ibid, 150.

EXPRESS COMPANIES.

DELIVERY OF GOODS BY THEM.

What constitutes. See DELIVERY, 2, 3.

ARE RESPONSIBLE FOR THE HONESTY OF THEIR AGENTS. See CARRIERS, 1.

EXTINGUISHMENT.

RIGHT OF ACTION.

1. *Whether it is extinguished by a payment by a third person.* Where A is primarily liable, and B only secondarily, A may still be sued for the benefit of B, though B has paid the debt. *American Express Co.* v. *Haggard*, 465.

2. *In case of the loss of property which is insured.* Thus, if insured property is destroyed by the act of a wrong doer, though the insurance company may have paid the loss, the owner of the property may still sue the wrong doer, and the recovery will be for the benefit of the insurance company. Ibid, 465. See PARTIES.

3. *In case of loss by an express company.* So in this case, a package of money sent by express was never received by the one to whom it was sent, but was receipted for by his clerk through mistake. The father of the clerk, on being apprised of the circumstances, paid the amount of the loss to the

EXTINGUISHMENT—*Continued.*

owner. It was held this payment was not for the benefit of the express company, and discharged no right of action which existed against them. The owner might still sue the company to recover the money lost, for the use of the father of the clerk. Ibid, 465.

FACTOR.

WHAT CONSTITUTES.

1. Where a person employs another to sell goods and wares at a distant place and agrees that the employee shall receive a certain sum yearly, and a stipulated portion of the profits for his services; and the employee is to select and rent a business house, and employ clerks and conduct the business; and all rents and expenses to be paid out of the proceeds, if sufficient; but if not, then by the employer: *Held*, that such an agreement constitutes the person conducting the business a factor. *Winne* v. *Hammond et al.*, 99.

FACTOR'S LIEN.

2. A factor has a lien on the goods and wares entrusted to him for sale, not only for his commissions, but for a general balance, for monies advanced, on account of the business. Ibid, 99.

LIEN PROTECTED AGAINST CREDITORS OF PRINCIPAL.

3. Creditors of the principal must discharge the factor's lien on the goods before they can levy their attachment, and subject the goods to their debts. Ibid, 99.

HAS A SPECIAL PROPERTY IN THE GOODS.

4. *And may sue for their recovery.* The factor has a special property in the goods of his principal, which will enable him to sue for and recover them, when wrongfully deprived of them, or to recover damages for injury done to them by others, or for its conversion, nor can a *tort feasor* question his title. Ibid, 99.

FALSE AFFIRMATION. See FRAUD, 1, 2.

FEES.

FEES OF CLERKS.

For keeping indices to their court records—construction of act of 16th February, 1865. Under the act of 16th of February, 1865, requiring the clerks of the Circuit Courts and County Courts having common law jurisdiction, to keep indices to their court records, an "entry" consists of all the various items which are required to be placed in each index, the plaintiffs' and defendants' in any one case, thus making two "entries," only, in each case—one in the plaintiff's index, and one in the defendant's. And for each of those "entries" the clerks may charge a fee of ten cents, or twenty cents for the two "entries" in each case, and no more. *Whitney et al.* v. *Ullman*, 423.

FORCIBLE ENTRY AND DETAINER.

OF ADVERSE POSSESSION BY DEFENDANT.

An instruction for the plaintiff in this action, which cuts off all consideration of an actual adverse possession in the opposite party, is erroneous. *Blanchard et al.* v. *Pratt*, 243.

FORMER CONVICTION.

WHEN NOT A BAR.

Conviction of the lesser offense which was included in the greater. An assault with a deadly weapon may embrace an assault and battery, yet a conviction of the latter, growing out of the same transaction, cannot be pleaded in bar of a prosecution for the former. *Severin* v. *The People*, 414.

FORMER DECISIONS.

WILLIAMS *v.* BLANKENSHIP, 12 ILL., 122.

1. *On the question of jurisdiction of justices of the peace.* Commented upon in *Miller, adm'r*, v. *McCray*, 428. See JURISDICTION, 4.

FORMER DECISIONS—*Continued.*

DAVIS *v.* THE PEOPLE, 19 ILL., 74.

2. *As to the competency of jurors over sixty years of age.* Adhered to in *Murphy* v. *The People*, 447. See JURY, 2.

FRACTION OF A DAY.

WHEN REGARDED. See Time, 1, 2.

FRAUD.

FALSE AFFIRMATION.

1. *When a ground for action on the case.* A false affirmation made by a party with intent to defraud another, whereby the plaintiff receives damage, is ground for an action on the case in the nature of deceit; and this, where the defendant making it, may not be benefited by the deceit. *Eames et al* v. *Morgan et al.*, 260.

2. Every false affirmation does not amount to a fraud, and if, by an ordinary degree of precaution, the plaintiff could have ascertained the falsity of the representations complained of, then the plaintiff is not entitled to recover. Ibid, 260.

SALE OF PERSONAL PROPERTY.

3. *Secret lien not allowable.* Where the vendor of personal property delivers possession to the purchaser, under an agreement that the property is to be considered as belonging to the vendor until the payment of the purchase money, notwithstanding such delivery of possession, such agreement, as to creditors of the purchaser, is fraudulent and void. *McCormick et al. Hadden*, 370.

POSSESSION BY A VENDOR OF GOODS, OF A PART.

4. *Its effect upon the vendee's right as to the residue, not in the vendor's possession.* A debtor sold and delivered a lot of goods in New York, which were shipped by the purchaser to Iowa. A portion of the goods were seized *in transitu*, while in possession of the agent of the vendee, under writs of attachment sued out by creditors of the vendor; the sale being a *bona fide* one, it was held, that the title of the vendee to this portion of the goods could not be affected by the fact, even if such fact existed, that the residue of the goods had reached their destination, and were in the possession of the vendor. The goods thus seized, while in the possession of the vendee's agent, stood unembarrassed by any difficulties which might have surrounded that portion which had reached their destination. *Hessing* v. *McCloskey*, 341.

EVIDENCE OF FRAUD.

5. *What constitutes—in the assignment of a note.* Proof that the holder of a note was insolvent at the time the assignment was made does not prove the transfer to have been fraudulent. Nor does the fact that the assignor was the nephew of the assignee prove the transfer fraudulent. *Wightman et al.* v. *Hart*, 123.

6. *Respecting the ownership of land.* The fact, that a man, with his family, resides upon land claimed by his father-in-law; and cultivates, uses and occupies it; paying taxes in his own name, is not evidence that he is the owner; and that the title is kept out of him to defraud his creditors. *Cameron* v. *Savage et al.*, 172.

7. The advice of such occupant to the owners to sell a tax title, under which they claim the land, to a third person, is not evidence that it is purchased by such third person on a secret trust for the benefit of the occupant. And the occupant, having previously contracted for the purchase of the patent title to the land, and forfeited the contract, and that title afterwards having been purchased by the same person who had purchased the tax title, does not prove that such third person holds the title for the benefit of the occupant. Ibid, 172.

8. A proposition by the person who had thus purchased the title that if the neighbors of the occupant who complained of his course in the matter would raise and pay him a certain sum of money, that he would convey to

FRAUD—*Continued.*

the children of the occupant, does not prove that he is fraudulently holding the title to defraud the creditors of the occupant. Ibid, 172.

ALLEGATIONS OF FRAUD.

Should not be general. See CHANCERY, 1.

FRAUDULENT RELEASE OF A WITNESS.

To restore competency — good for that purpose. See WITNESS, 8.

FRAUDULENT CONVEYANCE.

BOTH PARTIES MUST INTEND TO DEFRAUD.

1. In order that a transfer of goods shall be deemed fraudulent as to creditors of the vendor, both the vendor and his vendee must be guilty of the fraudulent intent. *Hessing* v. *McCloskey*, 341.

A PARTY THOUGH IN DEBT, MAY SELL HIS PROPERTY.

2. A party, though in debt, may sell his property to any one he pleases, for an honest and fair consideration, if no lien exists to forbid it. If the transaction be an honest one, made in good faith, and for an adequate consideration, it matters not how many creditors may be prevented thereby from reaching the property. Ibid, 341.

A DEBTOR MAY PREFER HIS CREDITORS.

3. And a debtor, in the sale of his property, has a right to prefer one creditor over all others. He may sell his property to one of his creditors in payment of his debt to him, to the exclusion of other creditors, and the consideration will be sufficient to support the transfer. *Hessing* v. *McCloskey*, 341.

GOVERNMENT LANDS.

OF THE ENTRY THEREOF.

1. *Rights of the purchaser.* When a person enters land at a Government Land Office, and pays for it either by a land warrant or in money, he acquires precisely the same equitable rights that he would in a similar transaction with a private individual. If the Government cancels an entry without proper cause, and issues the patent to another person having notice of the rights of the first purchaser, a Court of Chancery will direct the conveyance of the legal title to the rightful owner. *Aldrich et al.* v. *Aldrich et al.*, 32.

CANCELLATION OF ENTRIES.

2. *Authority of the Government in respect thereto.* In regard to entries of the public lands, the Government is selling simply as a land proprietor, and has no right, at its own mere discretion, and without just cause, to cancel its contract. Ibid, 32.

3. *Presumption that an entry was properly cancelled.* If the Government officers cancel an entry, *semble*, that the courts will presume, in the absence of proof, that such cancellation was upon valid grounds. But if it affirmatively appear that such cancellation was wrongfully made, the courts will disregard it. Ibid, 32.

4. *Rescission of an order of cancellation — its effect upon the title in view of a second entry.* If, after land has been entered under a military land warrant, the Commissioner of Pensions cancels the warrant, and thereupon the Commissioner of the General Land Office cancels the entry, and subsequently the Commissioner of Pensions rescinds the order cancelling the warrant, such rescission is evidence that such order of cancellation and the order cancelling the entry in consequence of the cancellation of the warrant, were both improperly made. Ibid, 32.

GUARANTY.

WHAT CONSTITUTES A GUARANTY.

1. An endorsement of a promissory note by the payee in this form, "I guaranty the collection of the within note," is nothing more than a simple assignment, for, by the Statute, the assignor, in every case, unless restricted

GUARANTY—*Continued.*

by the terms of the assignment, undertakes that the note can be collected, and if it cannot be, then he will pay it. *Judson* v. *Gookwin*, 286.

2. By such an endorsement, the liability of the endorser is neither increased nor diminished. Ibid, 286.

NOTICE OF ACCEPTANCE.

3. *When necessary.* When a letter of credit is addressed either to a particular person, or to the public generally, and credit is given in consequence thereof, the person giving the credit must notify the guarantor within a reasonable time that the guaranty has been accepted. But where A writes to B, who desires to purchase goods from A, that if C will guaranty the payment, he will sell B the goods, and C writes to A in reply that he will guaranty, no further notice of the acceptance of the guaranty is necessary. The bargain is complete when C accepts A's offer, and any further notice of acceptance by A would be superfluous. *Cooke* v. *Orne*, 186.

WHETHER CONSIDERATION NECESSARY.

Where the guaranty is by the payee of a note. See CONSIDERATION, 1.

HANDWRITING.

PROOF OF, BY COMPARISON. See EVIDENCE, 19.

HEIRS.

WHETHER THE HEIRS MUST BE NAMED *in proceedings by an executor to sell land to pay debts.* See EXECUTORS AND ADMINISTRATORS, 1.

ARE ENTITLED TO NOTICE *of such proceedings.* Same title, 3.

HOMESTEAD.

ABANDONMENT.

1. *What constitutes.* A debtor, who removes with his family to another State, and remains there for two years, may be regarded as having abandoned his homestead, without reference to what he may say before or after his return; by thus leaving he ceased to occupy the homestead, and it becomes liable to sale under execution. *Cabeen* v. *Mulligan*, 230.

2. So when the husband, being the head of a family, and residing with them, removes to another State, with his family, and remains there for two years before he returns, and declares that he expects to remain when he leaves, and after his return that he expected when he left to remain, but it was to his interest to return; his homestead thereby becomes liable to sale on execution. Ibid, 230.

3. *When presumed—what constitutes.* An abandonment of the homestead will not be presumed from the fact that the head of the family has gone in search of another home, and being disappointed, returns to his old home. *Ires et al.* v. *Mills et al.*, 73.

RIGHTS OF A MORTGAGEE.

4. *When the homestead right is not released.* A mortgagee of land to which there is "a homestead right," acquires no right to the homestead unless it is released in conformity with the Statute. Ibid, 73.

5. *In case of a sale by the mortgagor, and a re-purchase by him.* And if the owner of the homestead right sells the fee in the land to another, subject to the mortgage, and buys it back, the mortgagee gets no right to the homestead. Ibid, 73.

SALE BY THE OWNER, AND RE-PURCHASE.

6. *Rehabilitates the original owner in his homestead right.* The homestead can be reclaimed by the vendor by cancelling the sale with his vendee, and then the mortgagee would get no right to foreclose as to the homestead. *Ires et al.* v. *Mills et al.*, 73.

7. So when M, the owner of a house on lot on which he lived with his family, mortgaged the same to I, and afterwards sold to S, and left the premises, in neither case, released the homestead in pursuance of the statute, he can, on a reconveyance to him by S, and a return to the homestead,

HOMESTEAD—*Continued.*

set up his homestead right, against proceedings by the mortgagee by bill in chancery to foreclose. Ibid, 73.

8. Though when M sold to S, S agreed he would pay the mortgage, not being made to I, the mortgagee, it had no binding force, and on a reconveyance by S, M was rehabilitated to his original right. Ibid, 73.

OF POSSESSION BY A TENANT.

9. *When it will avail.* Whilst in case of the death of a husband, or of both parents, and the children are of tender years, possession by a tenant may protect the property from sale on execution, yet when the husband is living, the family must reside upon the homestead. *Cabeen* v. *Mulligan*, 230.

WHAT CONSTITUTES PURCHASE MONEY.

10. Where a party, owning and residing upon a homestead, purchases and obtains a conveyance of land adjoining thereto, to be used as a part of the same, and procures the purchase money of the land thus added to the homestead to be paid by a third person, as a loan to the purchaser, the money thus paid by the lender will be regarded as purchase money of the land thereby acquired, as against the homestead claim of the purchaser for whom it was paid. *Austin* v. *Underwood*, 438.

11. Such a case is distinguishable from one where money is borrowed to pay a preexisting debt which was created in the purchase of the homestead. Ibid, 438.

12. It is the common understanding of the term purchase money, that it means money paid for the land, or the debt created by the purchase. Ibid, 438.

13. *Effect of uniting in the security for the purchase money, a debt of a different character.* Although other indebtedness, as well as purchase money, may be secured by a deed of trust upon a homestead, in which there is no release of the homestead right, yet if the mortgagor omits to pay or offer to pay that portion which is purchase money, and a sale is had under the deed of trust in default thereof, the title will pass to the purchaser, and he may recover the premises in ejectment. Ibid, 438.

14. *Change in the form of security — its effect.* A change in the form of the security given for the purchase money, as from a mortgage to a deed of trust, will not change the character of the debt; the consideration of the mortgage being purchase money, it would so continue under the deed of trust. Ibid., 438.

OF THE WIDOW'S SEPARATE ALLOWANCE.

Disposition to be made of the homestead. See WIDOW, 4.

HUSBAND AND WIFE.

PRODUCTS OF THE WIFE'S LAND.

When they belong to the husband. See MARRIED WOMEN.

HUSBAND MAY ACT AS AGENT OF THE WIFE.

Respecting her separate property. See AGENCY, 1, 2.

INSTRUCTIONS.

OF THEIR GENERAL QUALITIES.

1. *They should not invade the province of the jury as to matters of fact.* It is error for the court to instruct the jury as to what is not proved; that is for them to determine; and if evidence tends to prove a fact, its consideration should not be taken from them by an instruction. *Winne* v. *Hammond et al.*, 99.

2. *Should give the jury full information on the particular subject.* When the court instructs a jury that the mortgagee in a chattel mortgage must take possession in a reasonable time, it should also inform the jury what facts, in reference to the case on trial, would constitute reasonable diligence. *Barbour et al.* v. *White et al.*, 164.

3. An instruction in an action of forcible entry and detainer, having relation to a possession under color of title, is objectionable, if it fails to define

INSTRUCTIONS—*Continued.*

what is color of title, that being a question of law. *Blanchard et al.* v. *Pratt*, 243.

4. An instruction on the question of legal possession is objectionable, if it leaves it to the jury to say what is a legal possession, for that is a question of law. Ibid, 243.

5. *Need not embody all the law governing the case.* An instruction which declares the law on the points therein presented, is sufficient, although it does not present all the law governing the case. *Hessing* v. *McCloskey*, 341.

6. *Those embodying mere abstract propositions of law, may be refused.* Where an instruction asked contains a mere abstract legal proposition, though correctly stated, error cannot be assigned on the refusal of the court to give it. Ibid, 341.

7. *Must be based upon the evidence.* An instruction not based upon the evidence should not be given. Ibid, 341.

8. *Where one of a series is objectionable.* It is sufficient, if a series of instructions properly present the law of the case, though one of the series, when disconnected, might be objectionable. *Walker et al.* v. *Collier et al.*, 362.

9. As a general rule, instructions depend upon themselves, but when a series are taken together, some of which are incorrect in themselves, may be so explained by others as to render them free from objection. *Murphy* v. *The People*, 447.

10. *May be refused if already given.* When a legal principle has once been announced in an instruction, there is no necessity for its repetition, and it is not error to refuse to give it in a second instruction. *Murphy* v. *The People*, 447; *Hessing* v. *McCloskey*, 341.

11. *Must be relevant.* It is not error to refuse an instruction when there is no evidence tending to support the hypothesis upon which it is based. *Murphy* v. *The People*, 447.

12. So it is proper to refuse an instruction asked by a party in an action of forcible detainer, which is based on the idea of a tenancy from year to year, when that was not the nature of the tenancy about which the controversy existed. *Secor* v. *Pestana*, 525.

13. *Should not exclude any facts which ought to be considered.* In an action to recover the amount of an account, the plaintiff gave in evidence certain pass books. The court instructed the jury "that they add up the pass books to ascertain the amount thereof." This was calculated to mislead the jury, as they might have understood it as directing them that the books were of that character of evidence which would exclude from their consideration all other questions except the amount when footed up as extended by the person making the entry when there were other questions to be considered in making up their verdict. *Horey* v. *Thompson & Co.*, 538.

14. The goods sued for were sold and delivered to one Soper, as the plaintiffs alleged, on the credit of the defendant, Hovey, and by his arrangement. The court instructed the jury that if they believed, from the evidence, that the goods in question were sold on the credit of Hovey, by his arrangement, they would find for the plaintiffs. This instruction is subject to the same objection as the preceding. It should have been so modified as to have informed the jury that if the goods were purchased on the credit of Hovey, and had not been paid for, then they should find for the plaintiffs. Ibid, 538.

15. An instruction given for the plaintiff in an action of forcible entry and detainer, which, by its terms, cuts off all consideration of an actual adverse possession in the opposite party, is erroneous. *Blanchard et al.* v. *Pratt*, 243.

INSURANCE.

PARTIES.

Where property insured, is destroyed by fire, through the fault of a third

INSURANCE—*Continued.*

person, and the insurer pays the loss, the owner of the property must sue the wrongdoer, for the use of the insurer. See PARTIES, 2.

INTEREST.

WHEN RECOVERABLE.

When recoverable and when not, where usury is established. See USURY, 2, 3.

When recoverable in trespass. See MEASURE OF DAMAGES, 3.

JOINT OWNERSHIP.

OF PERSONAL PROPERTY.

Relative rights of the parties, as to its possession and use. Where there are two joint owners of personal property, one is entitled to the same possession and enjoyment of it as the other, and neither can be made liable for its conversion except by proof that he assumed and exercised *exclusive* ownership, repudiating the rights of the other. *Swartwout* v. *Evans*, 442.

Demand by one joint owner of another—of its requisites. See DEMAND, 2, 3.

JUDGMENTS.

IN CRIMINAL CASES.

1. *Imposing a fine—adopting an improper verdict.* Where a court, in entering a judgment upon a verdict in a criminal cause, which found the defendant guilty, and in addition to fixing the term of imprisonment, which it might do, also imposed a fine, which the jury could not do, adopted the verdict entire, it is *held*, the court having the power to impose the fine, its judgment would be none the less valid because of the adoption of the amount improperly fixed in the verdict. *Armstrong* v. *The People*, 449.

JUDGMENT ON DEMURRER.

2. *Judgment in chief on overruling demurrer to plea, is a bar.* Overruling demurrer to pleas, establishes the pleas, and if no further answer is made to them, they are a bar to the recovery on the counts to which the pleas were pleaded, and no evidence can be received under those counts. A complete bar is interposed which shuts out all evidence in their support. *Miles et al.* v. *Danforth*, 156.

JUDGMENTS IN SUITS AGAINST SEVERAL.

3. *Case must be disposed of as to all.* It is error to render final judgment against a part of the defendants, without disposing of the case as to the others. *Barbour et al.* v. *White et al.*, 164.

JUDGMENT AFTER DEATH OF A SOLE PLAINTIFF.

4. *Default cannot be entered.* It is error to enter the default of a defendant after the death of a sole plaintiff, and before his representative has been made a party. Ibid., 164.

JUDGMENT MUST NOT EXCEED THE AD DAMNUM.

5. When, in an attachment suit, the affidavit states the sum to be due at fifteen hundred and 35-100 dollars, and the declaration in the conclusion claims damages for one thousand five hundred and fifty dollars, and a judgment is rendered for one thousand eight hundred and forty-five 72-100 dollars, and not increased to that sum by running interest, such judgment is erroneous, and will be reversed on appeal or writ of error. *Pierson et al.* v. *Finney*, 29.

JUDGMENT LIEN. See LIEN, 6.

JUDICIAL SALES. See SALES, 3, 4.

JURISDICTION.

ESSENTIAL TO THE VALIDITY OF A JUDGMENT OR DECREE.

1. In all judicial proceedings, to render a judgment or a decree binding, the court must have jurisdiction both of the person and the subject matter. *Morris et al.* v. *Hogle et al.*, 150.

JURISDICTION—*Continued.*

OF A JUSTICE OF THE PEACE.

2. *How affected by the form of the complaint.* A justice of the peace has jurisdiction in a prosecution for an assault and battery; and this jurisdiction will not be at all affected by the fact that the complaint, upon which the warrant for the arrest of the party accused was issued, charged him with an assault with a deadly weapon, because in that charge an assault and battery is included. *Severin* v. *The People*, 414.

3. *In suits by executors or administrators against one in his own right.* Justices of the peace have jurisdiction, under the tenth clause of the seventeenth section of the act in regard to justices of the peace, in suits brought by administrators against a person not an executor or administrator, where the amount claimed does not exceed one hundred dollars. *Miller, adm'r* v. *McCray*, 428.

4. *Former decision on this subject.* Nor in the case of *Williams* v. *Blankenship*, 12 Ill., 122, to be understood as deciding otherwise. The court there held that in a suit by an administrator and *against an executor*, the justice had no jurisdiction if the amount claimed exceeded twenty dollars. But they did not decide that executors and administrators could not bring suit to the amount of one hundred dollars, as the tenth clause of the section says they may, in all cases where another administrator or executor is not defendant. Ibid., 428.

JURY.

EMPANNELING A JURY.

1. *How many shall be called at a time.* There is a law requiring four jurors to be called at a time to be sworn. A less or a greater number may be called at any one time, and the parties be required to pass upon them. *Walker et al.* v. *Collier et al.*, 362.

COMPETENCY — AGE OF JUROR.

2. *When juror over sixty years of age — whether ground of challenge.* That a juror is over sixty years of age does not disqualify him; it is an exemption or privilege of which he alone can avail himself. It is not ground of challenge by either party. The rule in *Davis* v. *The People*, 19 Ill., 74, adhered to. *Murphy* v. *The People*, 447.

OF THE VENIRE — TIME FOR WHICH MAY BE SERVED.

3. *Whether venire for one week can be served for another.* On the trial, of a party upon the charge of murder, the defendant moved to quash the venire for the petit jury, upon the ground of an alleged irregularity in summoning the same, in this, that the venire was issued for jurors selected by the board of supervisors for the third week of the term, and the sheriff, by request of the circuit judge, executed the venire for the second week, and the defendant was thereby compelled to select a jury from a panel not chosen for the week in which he was tried. The alleged irregularity did not properly appear of record, but the court said they were not prepared to hold that such a change, if made, would be ground for reversal. *Murphy* v. *The People*, 447.

TO DECIDE UPON FACTS.

4. *Not the court.* It is error for the court to instruct the jury as to what is not proved; that is for them to determine; and if evidence tends to prove a fact, its consideration should not be taken from them by an instruction. *Winne* v. *Hammond et al.*, 99.

5. Upon the question whether a party was in possession of land, it is the province of the jury to find, under proper instructions, whether possession is proved. *Truesdale* v. *Ford*, 210.

6. In an action of replevin, where the issues are non-detinet, not the property of the plaintiff, and property in the defendant, and the fact of a partnership between the plaintiff and defendant is evolved on the trial, it is erroneous to dismiss the cause, on motion of the defendant, for want of jurisdiction. Such evidence should go to the jury, and would, perhaps, have determined the first issue for the defendant. *Belcher et al.* v. *VanDuzen*, 281.

JURY—*Continued.*

7. It was the right of the jury to decide the case on the evidence under the issues as they were made up, and although there might be a partnership between the parties to the suit, still, the plaintiff may have had the exclusive right to the immediate possession of the property in dispute. Ibid, 281.

TAKING PAPERS IN EVIDENCE ON RETIREMENT. See PRACTICE, 10.

JUSTICE OF THE PEACE.

JURISDICTION. See JURISDICTION, 2, 3, 4.

LAND.

AS REALTY AND PERSONALTY. See REAL AND PERSONAL ESTATE.

LANDLORD AND TENANT.

WHEN TENANT MUST PAY RENT.

1. *Notwithstanding lessor has not made repairs as he agreed.* Where a tenant enters into possession of premises under a lease containing a covenant by the lessor to make repairs, and occupied them for several months, and the landlord failed to make the repairs, the tenant, after abandoning the occupancy of the property, will be liable for the rent for the time, at the rate agreed upon. *Lunn et al.* v. *Gage*, 19.

COVENANT FOR REPAIRS BY LESSOR.

2. *Remedy of the tenant for breach thereof.* Where a tenant who has entered upon premises under a lease containing a covenant for repairs by the lessor, has suffered loss by reason of the landlord's failing to repair, in a reasonable time, he may recoup such damages against the rent. *Lunn et al.* v. *Gage*, 19.

3. *Construction of such a covenant, as to the time within which it is to be performed.* Where a lessor covenants in a lease of a hotel, to paint the building, to erect a stable, and lay a side track leading to a cattle yard connected with the hotel, and no time is specified when such repairs shall be made, the law will presume they were to be made for the benefit of the lessee, and within a reasonable time. Ibid, 19.

NOTICE TO QUIT.

4. *Whether necessary.* When a tenancy is for a fixed period, and the term thus expires by its own limitation, the tenant is then bound to surrender, and no notice to quit is necessary. *Seeor* v. *Pestana*, 525.

5. The act of 1861, on the subject of notice, applies only to tenancies of uncertain duration, as tenancies from year to year, in which sixty days' notice is required, and tenancies by the month, or for any time less than one year, when the tenant holds over without any special agreement, when thirty days' notice is required. Ibid, 525.

TENANCY FROM YEAR TO YEAR.

6. *What constitutes.* Premises were leased by writing for a term to expire on the 1st of May, 1863. Afterwards, by a verbal agreement, the tenant leased the same until the 1st of May, 1864. *Held*, that this did not constitute a tenancy from year to year. Ibid, 525.

LEGISLATIVE POWER. See CONSTITUTIONAL LAW, 1, 2, 3, 4.

LETTER OF CREDIT.

NOTICE OF ACCEPTANCE.

When necessary. See GUARANTY, 3.

LEVY.

WHAT CONSTITUTES A LEVY.

1. *In case of personal property—possession.* Where the furniture of a hotel is to be levied on, an officer is to be considered as having made the levy from the time he places a deputy or agent in possession. *Barbour et al.* v. *White et al.*, 164.

DESCRIPTION OF PROPERTY.

2. *When void for uncertainty.* A levy of an execution upon a tract of

LEVY—*Continued.*

land by the description of the "East fractional Southeast Section 6, 33, 4," would not be a levy upon the "East fraction of Section 6," the section having been so surveyed by the Government as to make both an East fractional part and a Southeast fractional quarter, distinct from each other, the land being intersected by a river. *Stout et al.* v. *Cook*, 283.

VOID LEVY AND SALE, AS A CLOUD UPON TITLE. See CHANCERY, 9.

LEX FORI—LEX LOCI.

BY WHICH A CONTRACT SHALL BE GOVERNED. See CONFLICT OF LAWS.

LIEN.

VENDOR'S LIEN.

1. *Of its origin—express contract not essential.* The lien of a vendor of land is the offspring of courts of equity alone, independent of any express contract, upon the mere supposition of the intention of the parties. *Cowl et al.* v. *Varnum*, 181.

2. *Of the waiver of this lien.* Whenever, therefore, the court can infer from any circumstances, that the vendor did not rely upon this lien for his security, it is treated as waived. Ibid, 181.

3. Taking the note of a third party for the purchase price is deemed a waiver of this lien. Ibid, 181.

4. Where a married woman purchased a tract of land, paying five hundred dollars of the purchase money with her own funds, not derived from her husband, and the husband gave his note for the balance of the purchase money, the vendor has no lien on the land for such balance. Ibid, 181.

5. *Not to be extended beyond settled principles of equity.* These liens are secret, and often productive of much injustice, and should not be extended beyond the requirements of the settled principles of equity. Ibid, 181.

JUDGMENT LIEN.

6. *Evidence of title being unrecorded, makes no difference.* The lien of a judgment upon an equitable estate in land belonging to the judgment debtor is not affected by the fact that the instrument under which the equity arises is not recorded. *Niantic Bank et al.* v. *Dennis*, 381.

OF A FACTOR'S LIEN. See FACTOR, 2, 3.

SECRET LIENS, ON SALES OF PERSONALTY.

Not allowable. See FRAUD, 3.

LIMITATION OVER.

BY DEED OR WILL. See WILLS, 1, 2, 3, 4.

MALICE.

WHEN IMPLIED.

In criminal cases. See CRIMINAL LAW, 1.

MARRIED WOMEN.

OF THEIR SEPARATE PROPERTY UNDER ACT OF 1861.

1. *Products of wife's land, when cultivated by the husband.* Where the husband, as the head of the family, occupies and cultivates the land of the wife, he must be considered as occupying it, with her consent, for the common benefit of the family; and the products of his toil, upon such land, are as much his property, notwithstanding the act of 1861, as if he had occupied, as a tenant, land rented from some third person. *Elijah* v. *Taylor*, 247.

MEASURE OF DAMAGES.

IN ACTION FOR MONEY HAD AND RECEIVED.

1. A party executed a mortgage to secure a sum of money which the mortgagee promised to pay to a third person upon a debt of the mortgagor. The mortgage was paid, the mortgagor having also been obliged to pay,

MEASURE OF DAMAGES—*Continued.*

himself, the debt which the mortgagee agreed to pay for him. In addition to the principal sum which the mortgagee was to pay for the mortgagor, there was usurious interest computed thereon for a given time, and which, with the principal sum, formed the amount of the mortgage which was paid. *Held*, that the measure of damages in an action for money had and received against the mortgagee, would be the whole amount paid upon the mortgage, including the usurious interest. *Town* v. *Wood*, 512.

2. The mortgagor does not, in such case, recover back the usurious interest because it was usurious, but he merely recovers back whatever of principal and interest he has paid, because the consideration upon which it was received has wholly failed. Ibid, 512.

IN TRESPASS AGAINST AN OFFICER.

3. *For improperly levying upon goods.* Where there has been a *bona fide* sale and delivery of goods by the owner to any one of his creditors, in payment of a debt, and the goods are afterwards taken by the sheriff, under writs of attachment sued out by other creditors of the vendor, the vendee may maintain trespass against the sheriff, and recover, as damages, the value of the goods at the time of such taking, with interest from that time to the time of trial, at the rate of six per cent. per annum. *Hessing* v. *McCloskey*, 341.

MISTAKE.

IN WRITTEN INSTRUMENTS.

1. *Will be corrected only in a clear case.* Written instruments are made to express the agreements of parties, and the safety of the community requires allegations of mistakes in them should be regarded only where the evidence is clear, free from suspicion, and entirely satisfactory. *Adams et al.* v. *Robertson, et al.*, 45.

IN SETTLEMENT OF ACCOUNTS.

2. *Whether the parties are concluded.* Although parties may agree upon a settlement made between them, as to the amount due from one to the other, yet such agreement is not conclusive if it was the result of an error in regard to the items or in the computation of interest. *Town* v. *Wood*, 512.

MONEY HAD AND RECEIVED.

WHEN ACTION LIES THEREFOR. See ASSUMPSIT, 2, 3, 4.

MORTGAGES.

WHAT CONSTITUTES A MORTGAGE.

1. *In case of a deed, absolute on its face.* Where a deed is given, which is absolute on its face, and a written agreement executed the same day, by which the money is to be paid by a certain day, the entire transaction will be considered as a loan, with mortgage security on the land conveyed. *Snyder* v. *Griswold*, 216.

OF THE RIGHT OF HOMESTEAD.

Mortgagee has no right to homestead unless it is released. See HOMESTEAD, 4.

Nor in case of a sale and re-purchase by the mortgagor. Same title, 5, 6, 7, 8.

CHANGE OF THE FORM OF SECURITY.

Does not change the character of the debt secured. See HOMESTEAD, 14.

INTEREST — WHEN RECOVERABLE AND WHEN NOT.

Where there is usury. See USURY, 2, 3.

MOTION.

WHEN IT IS NOT THE REMEDY.

Where a party who is sued as a corporation seeks to raise the question whether the defendant is a corporation, upon matter *dehors* the record, the question is one to be presented by plea in abatement and not by motion. *American Express Co.* v. *Haygard*, 465.

NEGLIGENCE.

In case of collision of vehicles.

1. *Degree of care required of the party complaining.* In action brought by the owner of one vehicle against the owner of another, for damages resulting from a collision, if the defendant has been guilty of negligence, and the plaintiff has shown all the care and skill which can be expected from men of ordinary prudence in like circumstances, he is entitled to recover. *Coursen* v. *Ely*, 338.

2. *Of mutual negligence.* Although the plaintiff may be guilty of some degree of negligence, yet if it is but slight as compared with that of the defendant, the plaintiff can recover, and this rule holds even where the slight negligence of the plaintiff in some degree contributed to the injury. Ibid, 338.

NEW TRIALS.

Error not always ground for a new trial.

As where no injury has resulted therefrom. See ERROR, 5, 6.

NOTICE.

When necessary, and when not.

1. *On motion to set aside proceedings in partition.* On a motion to set aside such proceedings, it is indispensable that the purchaser at the sale in partition should have notice thereof. *Dunning et al.* v. *Dunning et al.*, 306.

2. *Of a sale of land under a decree.* In case of a sale of land under a decree, whether the want of sufficient notice thereof operated to prevent competition, or was occasioned by design or accident, will make no difference. There must still have been proper notice. *Swords* v. *Pritchett*, 517.

3. *In case of dormant partner upon his retirement.* See PARTNERSHIP, 1, 2.

4. *Notice of proceedings to sell land of an estate to pay debts is essential to the validity of the decree.* See EXECUTORS AND ADMINISTRATORS, 2, 3,

5. *When notice of acceptance of a guaranty or letter of credit is necessary.* See GUARANTY, 3.

What constitutes a notice.

6. *As distinguished from a contract — endorsement upon a free railroad pass, restricting the liability of the company in case of injury.* See RAILROADS, 3.

Notices of sales, under a decree.

7. *Posting them in public places.* A decree for the sale of land directed notices thereof to be posted in five public places in the neighborhood. Upon exceptions taken to the report of the sale, it appeared two of the notices were posted at school-houses, but it did not appear they were being occupied at the time; though, even if that were so, the court were not prepared to say they could judicially know that they would afford notice to a single man in the neighborhood. *Swords* v. *Pritchett*, 517.

8. The other notices were posted upon roads, one of them only being mentioned as a public road, leaving it rather to be implied the others were not. Six persons living in the vicinity of the land had never seen any of the notices, and none were posted about the court-house, nor was any published in the county newspaper. But few persons attended the sale, and the property sold for about two-thirds of its value. *Held*, the notice of the sale was not sufficient. Ibid, 517.

9. *Of the time for which notice should be given.* The decree for the sale fixed no time for which notice should be given. In this case, only twenty days were given; and while such notice might not, of itself, afford sufficient ground for setting aside a sale, yet, in connection with inadequacy of price, or other irregularity, it is an important circumstance. Ibid, 517.

10. It has not been the practice of courts to make sales without redemption upon so short a notice. Ibid, 517.

NOTICE—*Continued.*

11. By analogy with the time required for sales by executors and administrators, which is six weeks, it would seem the legislature regarded that as but reasonable time for sales of real estate. Ibid, 517.

NOTICE SHOULD BE PRESCRIBED IN THE DECREE. See DECREE.

WHO ARE CHARGEABLE WITH NOTICE.

12. *Purchaser under void decree.* A purchaser under a void decree, and those claiming under him, are chargeable with notice that the decree was void, and will not be protected. *Morris et al.* v. *Hogle et al.*, 150.

POSSESSION OF LANDS.

13. *When it operates as notice as to rights of the occupant.* See POSSESSION, 2, 3, 4.

NOTICE TO QUIT.

AS BETWEEN LANDLORD AND TENANT. See LANDLORD AND TENANT, 4, 5.

OFFICER.

WHEN LIABLE FOR AN ESCAPE. See ESCAPE. 1, 2.

WHEN LIABLE FOR TRESPASS. See TRESPASS, 1.

PARTIES.

PARTIES AT LAW, GENERALLY.

1. When an injury is done to property, the remedy must be sought in the courts of common law, by some person who has an estate in the property, legal or equitable, which the law recognizes. *Peoria Marine and Fire Insurance Co.* v. *Frost et al.*, 333.

2. *Where property insured is destroyed by fire, through the fault of a third person, and the insurer pays the loss, who shall sue the wrong doer.* Where insured property has been burned by the carelessness of a railway company, and the insurance company has paid the loss, it cannot maintain an action in its own name against the railway company. The suit must be brought in the name of the owner of the property for the use of the insurer. Ibid, 333.

3. *The rule in case of marine insurance.* Although a different rule may be applied in cases of marine insurance, it rests upon the doctrine of abandonment, and subrogation of the insurer to the rights and title of the insured, a doctrine which has no existence in cases of fire insurance. Ibid, 333.

See EXTINGUISHMENT.

4. *Right of a factor to sue for the recovery of goods of principal, or for injury thereto.* See FACTOR, 4.

IN CHANCERY.

5. *In bill for specific performance.* In a case of a bill for a specific performance of a contract, as a general rule, subject to some exceptions, the parties to the agreement are alone necessary parties. *Gibbs* v. *Blackwell et al.*, 191.

6. On a bill filed to enforce the specific performance of a contract, for the conveyance of real estate, it is no defense, to set up that the money paid was a trust fund; or that the purchase was made by one as trustee of another. If a trust exists, the vendee, or in case of his death, his heirs will be liable to account to the *cestuis que trust*, and he is not a necessary party to a bill, to compel a conveyance. Ibid, 191.

BENEFICIAL PLAINTIFF.

7. *Need not be named in the record.* The fact that a suit is brought for the use of a third person need not be expressed upon the record. *American Express Co.* v. *Haggard*, 465.

WHETHER HEIRS SHOULD BE NAMED AS PARTIES.

8. *In proceedings by an executor for a decree to sell land to pay debts.* See EXECUTORS AND ADMINISTRATORS, 1.

PARTITION.

WHETHER PETITION SHOULD BE SWORN TO.

And herein, of the time within which the objection must be made. In a suit for partition of lands, after answer filed, decree for partition had, commissioners appointed, their report approved, a sale of the land ordered, the yearly value of the dower of the widow assessed, and a sale of the lands made by the Master in Chancery, it is too late to object that the petition was not sworn to. If made at the outset, and before answer filed, it might prevail. *Dunning et al.* v. *Dunning et al.*, 306.

PARTNERSHIP.

OF DORMANT PARTNERS.

1. *Of their liability, and herein, when notice of their retirement is necessary.* Where a person permits his name to appear as member of a partnership, or where, his name not appearing, he is nevertheless known as a partner, he continues liable, after his retirement, for debts to persons who have no notice of such retirement, and who have known him as a partner. *Warren et al.* v. *Ball et al.*, 76.

2. But notice of the retirement of a dormant partner is not necessary in order to protect him from liability, in subsequent transactions, with persons who have had no knowledge of his connection with the firm. Ibid, 76.

PLEADING IN RESPECT THERETO.

Requisites of a replication to a plea denying partnership of defendants. See PLEADING, 1.

PROOF OF BY ADMISSIONS. See EVIDENCE, 12.

REPLEVIN, AS BETWEEN PARTNERS. See REPLEVIN, 1.

PASSES, UPON RAILROADS.

LIABILITY OF RAILROADS.

For injuries to passengers traveling under free passes. See RAILROADS, 1, 2, 3.

PAYMENT.

WHAT CONSTITUTES.

1. *In case of collaterals.* Where notes of third parties are placed in the hands of a creditor as collateral, but are not paid, the party depositing them can claim no credit for the amount due by them. *Prettyman et al.* v. *Barnard*, 105.

PAYMENT BY ONE SECONDARILY LIABLE.

2. *Whether the right of action is thereby extinguished.* See EXTINGUISHMENT.

PERSONAL PROPERTY.

WHAT CONSTITUTES.

1. The term "personal property" applies as well to notes and money as to goods and chattels. *Brownell* v. *Dixon*, 197.

OF WHAT IT MAY CONSIST. See ESTOPPEL, 1.

WHEN AN INTEREST IN LAND BECOMES PERSONAL PROPERTY. See REAL AND PERSONAL ESTATE, 1.

POSSESSION, EVIDENCE OF OWNERSHIP.

2. The possession of personal property is *prima facie* evidence of ownership. *Brownell* v. *Dixon*, 197.

PLEADING.

AVERMENT.

1. *In replication to plea denying partnership.* Where three persons were sued as partners on an instrument executed in the partnership name, and one of them filed a plea denying the partnership at the date of the note, to which the plaintiffs replied that the defendants were partners prior to the making of the note, and that they received it from one of the defendants

PLEADING—*Continued.*

without notice of the dissolution. *Held*, that the replication was bad, in not averring that the defendant had been known to the plaintiffs as a member of the firm, the declaration disclosing that he was sued as a dormant partner, and his name not appearing in the style of the firm. *Warren et al.* v. *Ball et al.*, 76.

PLEADING TO AMEND DECLARATION.

2. *When necessary to plead anew.* The plea of not guilty filed to the original declaration in an action on the case for deceit, stands as the plea to the declaration when amended, and it is not necessary to refile it. The rule is, a defendant should answer an amendment declaration anew, unless he has a plea in, which would answer any declaration in the form of action used. *Eames et al.* v. *Morgan et al.*, 260.

SPECIAL PLEA.

3. *When it amounts to the general issue.* In an action of assumpsit to recover "for commissions on sale of land made by the plaintiff for the defendant, at the defendant's request," the defendant pleaded specially, that "the plaintiff, not being the agent of the defendant, but without authority thereto, pretended to sell" the real estate of the defendant, and executed and caused to be recorded a writing purporting to be a sale thereof, by reason of which, and to avoid such pretended sale, the defendant had incurred expense and damage which he offered to set off against such claim as the plaintiff might establish. This plea did not amount to the general issue. Its object was simply to set off unliquidated damages arising out of the subject matter of the suit. *McEwen* v. *Kerfoot*, 530.

4. It did not seek to put in issue the question of agency, for the agency was not averred in the declaration. The recital in the plea on that subject was only by way of protest, that the pleader might not be considered as admitting the agency of the plaintiff. Ibid, 530.

PLEA OF RELEASE.

5. *Its requisites.* It is not necessary, in pleading a release, that it should be averred it was under seal. A release, *ex vi termini*, imports a seal; and it is a matter of evidence, whether it have a seal or not, if a seal be necessary. *Illinois Central Railroad Co.* v. *Read*, 484.

GENERAL QUALITIES OF A PLEADING.

6. *Should not be argumentative.* In a suit against three persons as partners doing business under the name J. J. B., one of them pleaded in abatement, that they were not partners, but did not aver in the plea that they were not partners under the name of J. J. B. *Held*, if a demurrer had been interposed, the plea would have been pronounced bad because argumentative. *Gordon et al.* v. *Bankard et al.*, 147.

7. *Plea to the whole declaration—its requisites.* In an action on the case to recover damages resulting from the negligence of the defendant, three of the counts in the declaration averred gross negligence, while another count averred negligence only. A plea to the whole declaration was held bad on demurrer, because it did not answer the charge of gross negligence. *Illinois Central Railroad Co.* v. *Read*, 484.

DEFECTIVE PLEADING CURED.

8. *By pleading over.* In a suit against three persons as partners, doing business under the name of J. J. B., one of them pleaded in abatement, that they were not partners, but did not aver in the plea that they were not partners under the name of J. J. B. The plea would have been held bad on demurrer, because argumentative, but the plaintiff having taken issue, it was proper for the court to instruct the jury that they must find for the defendants, unless they believed, from the evidence, that, at the time the contract was executed, the defendants were partners under the name of J. J. B. *Gordon et al.* v. *Bankard et al.*, 147.

9. *Not always, however.* Where it is incumbent on the plaintiff to aver in his declaration, performance of certain terms in a contract, and he avers a performance in terms susceptible of an equivocal construction, the defend-

PLEADING—*Continued.*

ant may demur, but he is not obliged to do so. He may plead the general issue, treating the averment of performance as such an averment as the nature of the contract required the plaintiff to make, and on the trial, may insist that the plaintiff shall prove such performance as the contract required. *Grosvenor et al.* v. *Magill & Latham*, 239.

PLEA IN ABATEMENT.

What must be pleaded in abatement. See ABATEMENT, 1.

Plea must give a better writ. Same title, 2, 3.

WHEN THE PLAINTIFF MUST DECLARE SPECIALLY.

And when he may recover under the common counts. See PLEADING AND EVIDENCE, 1, 2.

WITHDRAWAL OF PLEADING. See PRACTICE, 9.

PLEADING AND EVIDENCE.

EVIDENCE UNDER CERTAIN ISSUES.

1. *When the plaintiff must declare specially.* When a party executes a mortgage to secure a sum of money which the mortagee promises to pay to a third person upon a debt of the mortgagor, if the mortgagee refuses to pay the debt, the mortgagor, the mortgage being unpaid, can only recover for his failure so to do, by a suit brought upon the special contract. *Town* v. *Wood*, 512.

2. *When recoverg can be had under the common counts, for money had and received.* But the mortgage being paid, and the mortgagor having also been obliged to pay, himself, the debt which the mortgagee agreed to pay for him, he has a right to treat the money which went into the hands of the mortagee in consideration of his undertaking to pay the debt, as received by the mortgagee to his use, and to recover it back in an action for money had and received, the consideration upon which it was received having wholly failed. In such case it is not necessary to declare specially. *Town* v. *Wood*, 512.

IN AN ACTION ON THE CASE FOR DECEIT.

3. *The contract is not involved.* The court, in such action for a deceit, growing out of a contract, is not authorized to instruct the jury, where deceit is the gravamen of the action, upon any point involving the performance of the contract, out of which the deceit had its origin. *Eames et al.* v. *Morgan et al.*, 260.

PROOF UNDER DEFECTIVE PLEADINGS.

4. *Under a bad declaration.* A bad declaration does not necessarily entitle a party to recover on insufficient evidence. *Grosvenor et al.* v. *Magill & Latham*, 239.

5. Where it is incumbent on the plaintiff to aver, in his declaration, performance of certain terms in a contract, and he avers a performance in terms susceptible of an equivocal construction, the defendant may demur, but he is not obliged to do so. He may plead the general issue, treating the averment of performance as such an averment as the nature of the contract required the plaintiff to make, and on the trial, may insist that the plaintiff shall prove such performance as the contract required. Ibid, 239.

6. *Under a bad plea in abatement.* In a suit against three persons as partners, doing business under the firm of J. J. B., one of them pleaded in abatement, that they were not partners, but did not aver in the plea that they were not partners under the name of J. J. B. The plea would have been held bad on demurrer, because argumentative, but the plaintiff having taken issue, it was proper for the court to instruct the jury that they must find for the defendants, unless they believe, from the evidence, that at the time the contract was executed, the defendants were partners under the firm of J. J. B. *Gordon et al.*, v. *Bankard et al.*, 147.

SWORN ANSWERS IN CHANCERY.

7. *Degree of evidence required to overcome them.* When complainant

PLEADING AND EVIDENCE—*Continued.*

requires the answer of defendant, under oath, and he so answers, it can only be overcome by the evidence of two witnesses, or by the evidence of one, and circumstances equal in weight to that of another. *Wightman et al.* v. *Hart*, 123.

POSSESSION.

ADVERSE POSSESSION.

1. *In forcible entry and detainer.* An instruction for the plaintiff in an action of forcible entry and detainer, which cuts off all consideration of an actual adverse possession in the opposite party, is erroneous. *Blanchard et al.* v. *Pratt*, 243.

POSSESSION OF LANDS — NOTICE AFFORDED THEREBY.

2. *Of the character of possession required.* Possession, under an unrecorded deed, to be notice to subsequent *bona fide* purchasers, must be open, visible and exclusive; and must apprize the community that the occupant under the unrecorded deed has appropriated the property to his exclusive use. *Truesdale* v. *Ford*, 210.

3. If the premises thus held are only occupied in common with others, and the public generally, it does not afford notice — it would not be hostile, or afford evidence that it was made under, or in the assertion of title. It will be presumed that all persons, before purchasing lands, will inform themselves of its condition, and if occupied, learn under what right. Ibid, 210.

4. *In what manner possession may be held.* Possession of land may be held in different modes — by enclosure, by cultivation, by the erection of buildings, or other improvements; or, in fact, by any use that clearly indicates an appropriation to the use of the person claiming to hold the property. Ibid, 210.

IN CASE OF A HOMESTEAD.

Whether possession by a tenant is sufficient. See HOMESTEAD, 9.

WHAT IS LEGAL POSSESSION.

Is a question of law. *Blanchard et al.* v. *Pratt*, 243.

IN CASE OF A CHATTEL MORTGAGE.

When the mortgagee must take possession of the property, and of the diligence required in respect thereof. See CHATTEL MORTGAGES, 1, 2, 3.

LEVY UPON PERSONAL PROPERTY.

Possession must be taken. See LEVY, 1.

EVIDENCE OF OWNERSHIP OF PERSONALTY. See PERSONAL PROPERTY, 2.

POSSESSION IN VENDEE OF PERSONALTY.

Will defeat a secret lien between the parties, as to creditors of the vendee. See FRAUD, 3.

DELIVERY OF POSSESSION.

What constitutes, as between the parties, See DELIVERY, 1.

POSSESSION BY A VENDOR OF GOODS, OF A PART.

Its effect upon the vendee's right as to the residue, not in the vendor's possession. See FRAUD, 4.

PRIOR POSSESSION, AS BETWEEN TWO PURCHASERS.

Its effect on the title. See SALES, 2.

PRACTICE.

DISMISSAL OF CAUSE FOR WANT OF JURISDICTION.

1. *When not proper.* In an action of replevin, where the issues are non-detinet, not the property of the plaintiff, and property in the defendant, and the fact of a partnership between the plaintiff and defendant is evolved on the trial, it is erroneous to dismiss the cause, on motion of the defendant, for want of jurisdiction. *Belcher et al.* v. *Van Duzen*, 281.

2. Such evidence should go to the jury, and would, perhaps, have determined the first issue for the defendant. Ibid, 281.

PRACTICE—*Continued.*

DISMISSAL OF APPEALS FROM JUSTICES.

3. *Order set aside only on merits shown.* An order dismissing an appeal in the Circuit Court for want of prosecution, will only be set aside on affidavit disclosing merits. *Allen* v. *City of Monmouth*, 372.

AMENDMENTS OF A DECLARATION.

4. *Should be specified when defendant calls for them.* The Circuit Court should require the plaintiff to specify the amendments he has made to his declaration, on being called on for that purpose by the defendant, in a regular manner. *Eames et al.* v *Morgan et al.*, 260.

WITHIN WHAT TIME CERTAIN OBJECTIONS MUST BE TAKEN.

5. *That petition for partition is not sworn to.* In a suit for partition of lands, after answer filed, decree for partition had, commissioners appointed, their report approved, a sale of the land ordered, the yearly value of the dower of the widow assessed, and a sale of the lands made by the Master in Chancery, it is too late to object that the petition was not sworn to. *Dunning et al.* v. *Dunning et al.*, 306.

6. *That no bond for costs is filed.* The objection that no bond for costs was filed in a suit for partition, the plaintiff being a non-resident, comes too late after answer filed; if not made at the proper time, it will be considered as waived. Ibid, 306.

7. *Objections to evidence in depositions.* Statements in a deposition which are not legitimate evidence, like hearsay, may be objected to on the trial, but those which are objectionable, merely because secondary evidence, should be objected to before the trial. *Cooke* v. *Orne*, 186.

RULE OF COURT.

8. *To produce papers—what is a sufficient answer.* A rule of court, that defendant produce the remaining part of a letter, a portion of which he had attached to a commission to take depositions, or show cause, is properly answered and discharged, when, in answer to the rule, the party denies that he has the other part, and states that he believes it to be lost or destroyed. *Cameron* v. *Savage et al.*, 172.

WITHDRAWAL OF PLEADINGS.

9. *Discretionary with the court.* Whether the court will allow a replication to be withdrawn, is a matter of discretion, and its exercise cannot be assigned as error. *Miles et al.* v. *Danforth*, 156.

JURY TAKING PAPERS GIVEN IN EVIDENCE.

10. *On their retirement.* Papers and books given in evidence upon a trial, may properly be taken by the jury on their retirement to consider of their verdict. *Horey* v. *Thompson & Co.*, 538.

EMPANNELING A JURY.

How many shall be called at a time. See JURY, 1.

JURY SHOULD BE ALLOWED TO DETERMINE QUESTIONS OF FACT.

And such questions should not be taken from them by motion to dismiss or instructions. See JURY. INSTRUCTIONS 1, 13, 14, 15.

JUDGMENT IN SUIT AGAINST SEVERAL DEFENDANTS.

The case must be disposed of as to all. See JUDGMENTS, 3.

PRACTICE IN THE SUPREME COURT.

ABSTRACTS.

1. *Dismissal for want of—discretionary.* It is discretionary with this court, to dismiss a cause for want of complete abstract, or for non-compliance with a rule to furnish abstract by a certain time. *Prettyman et al.* v. *Barnard*, 105.

MODE OF TESTING SUFFICIENCY OF PLEADING.

2. *Of the declaration.* Only by a demurrer in the court below, or by a motion in arrest of judgment, can the sufficiency of a declaration be brought before the Supreme Court. *Cooke* v. *Orne*, 186.

PRACTICE IN THE SUPREME COURT—*Continued.*

WHAT THE RECORD SHOULD CONTAIN.

What must be brought into the record by bill of exceptions. See BILLS OF EXCEPTIONS, 2, 3, 4.

BILLS OF EXCEPTIONS.

Of their necessity, and their requisites. See BILLS OF EXCEPTIONS, 1, 2, 3, 4.

ERROR WILL NOT ALWAYS REVERSE. See ERROR, 5, 6.

PRESUMPTIONS.

THAT THE VERDICT OF A JURY IS CORRECT.

Where the evidence is not preserved in the record. See BILLS OF EXCEPTIONS, 1.

AS TO THE EXTENT OF A VERDICT. See VERDICT, 1.

THAT AN EXECUTION IS ISSUED UNDER PROPER AUTHORITY. See EXECUTION, 1.

IN REGARD TO ASSIGNMENT OF A NOTE.

That it was for value and bona fide. Wightman et al. v. *Hart*, 123.

CANCELLATION OF ENTRIES OF PUBIC LANDS.

Whether it was properly done. See GOVERNMENT LANDS, 3.

PRINCIPAL AND AGENT. See AGENCY.

PROCESS.

WHETHER NECESSARY.

On appeals from a police magistrate to the Circuit Court. See APPEALS, 1.

PROOF OF SERVICE THEREOF.

By recital in the decree. See CHANCERY, 4.

SERVICE OF PROCESS.

Waived by appearance. See APPEARANCE, 1.

PROMISSORY NOTES.

WHAT CONSTITUTE.

1. *Certificate of deposit.* A banking house issued a certificate of the following form: "Banking house of E. T. Hunt & Co., Sycamore, Ill., March 9th, 1861, C. M. Chase, Esq., has deposited in this bank two hundred and eighty dollars and fifty cents, in currency, subject to the order of himself, and payable in like funds on return of this certificate, three months after date, E. T. Hunt & Co.," endorsed "C. M. Chase." *Held*, such a certificate was in effect, a mere promissory note, and governed by the rules and principles applicable to that class of paper. The makers of the certificate engaged to pay to the order of Chase, the amount specified in it, in three months after its date, and at no particular place nor on demand. *Hunt et al.* v. *Divine*, 137.

RETURN OF THE CERTIFICATE — WHETHER NECESSARY.

2. *Effect of the words "on return of this certificate."* These words do not change the legal effect of the undertaking, or require the holder to present the note at the banking-house of the makers. There being no promise to pay at the banking-house, there was, consequently, no obligation on the holder to present it there. Ibid, 137.

3. There being no place named where this money was to be paid and the certificate returned, the return of the certificate cannot be a condition precedent to a recovery. If it is produced on the trial, ready to be delivered up to the maker, the holder will have performed his obligation. In every promissory note, there is an implied undertaking by the payee or holder to return it to the maker on payment of the money. Ibid, 137.

DEMAND.

4. *When not necessary.* In regard to this kind of paper the rule is, the maker must find his paper and take it up. The demand is by the maker on

PROMISSORY NOTES—*Continued.*

the holder, which, when made, will be the time to return the certificate. Ibid, 137.

5. *A promissory note payable on demand*, against the maker, can be prosecuted to judgment without averring or proving any demand. So, if it is made payable at a particular time and place, it is not necessary to aver or prove a demand at the place, in order to a recovery. Ibid, 137.

PROPERTY.

OF SPECIAL PROPERTY.

Factor has a special property in goods of the principal, and herein of his rights in respect thereof. See FACTOR, 4.

PURCHASER.

FROM ONE HOLDING AN EQUITABLE TITLE.

1. *His liability for unpaid purchase money on the prior sale.* A party purchasing land gave his notes for the purchase money, and received a bond for a conveyance, when they should be paid. While a portion of these notes remained unpaid, the purchaser sold and conveyed the premises to a third party. *Held*, there being no express covenant or agreement on the part of the grantee of the person holding the title bond, to pay the balance of the purchase money due under the former purchase, nor any deduction of the amount from the purchase price, from which such an agreement might be implied, he cannot be held liable therefor to the holder of the note for the same. *Comstock* v. *Hitt*, 542.

2. *What would constitute an agreement to pay—construction of a deed.* The title bond in question was executed by Heman Baldwin to Ann C. Wilson. The deed from the latter contained this clause: "subject, nevertheless, to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named." This language could not be construed into an agreement on the part of the grantee accepting the deed, to pay the outstanding notes of the grantor. The whole extent of that clause in the deed was, that if the grantee would pay the obligee in the bond, he could compel the execution of a deed to him. If he did not, he would get no title. Ibid, 542.

GRANTEE OF A MORTGAGOR.

3. *Where there is an agreement to pay, or the amount of the incumbrance is deducted from the price.* The case above stated is wholly variant from one where a grantee of a mortgagor agrees to pay the incumbrance, or it is allowed to the purchaser by a deduction from the price of the land, from which the law would imply a promise on his part to idemnify the grantor against the mortgage debt. Ibid, 542.

4. *Taking a deed "subject to an outstanding mortgage,"* creates no personal liability on the part of the grantee to pay off the incumbrance, unless he has specially agreed to do so, or the amount of the mortgage has been deducted from the purchase price. Ibid, 542.

5. *To whom the subsequent purchaser would be responsible if at all.* But if the grantee in this case were under any obligation in regard to the outstanding notes of his grantor, it would be to him and not to the holder of the notes. Ibid, 542.

PURCHASER UNDER VOID DECREE.

6. *Is chargeable with notice, and will not be protected.* The law will presume that all men inspect public records through which a title is derived, before purchasing, and failing to do so, the law will not relieve them from the consequences of purchasing under a void decree; and purchasers will not be protected in their title when they buy under a void decree. *Morris et al. v. Hoyle et al.*, 150.

7. A void decree confers no power on an executor to sell the property of a testator, and his grantee, as well as subsequent purchasers of the property are chargeable with notice, and a court of equity will set such conveyance aside, as a cloud on the owner's title. Ibid, 150.

PURCHASER—*Continued.*

PRIOR AND SUBSEQUENT PURCHASERS.

Of government lands—of their relative rights. See GOVERNMENT LANDS, 1, 2, 3, 4.

PURCHASE MONEY.

WHAT CONSTITUTES. See HOMESTEAD, 10, 11, 12, 13, 14.

QUIT CLAIM DEEDS. See CONVEYANCES, 1, 2, 3, 4, 5.

RAILROADS.

FREE RAILROAD PASSES.

1. *To what extent railroad companies may, by special contract, be exempted from liability for injuries to passengers.* A passenger, while traveling in the cars of a railroad, received injuries to his person, occasioned by a collision of trains. At the time of the accident, the passenger was traveling under a free pass given him by the company, upon the back of which was this printed endorsement: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees that this company shall not be liable, under any circumstances, whether of negligence of their agents, or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using the ticket." In an action on the case against the company, to recover damages for the injuries thus received by the passenger, it was *held*, that this agreement did not exempt the company from liability for the gross negligence of its employees, but it did exempt it from liability for any other species or degree of negligence not denominated gross, or which might have the character of recklessness. For such unavoidable accidents, as will happen to the best managed railroad trains, this agreement would be a perfect immunity to the company. *Illinois Central Railroad Co.* v. *Read*, 484.

2. Railroad companies have a right to restrict their liability as common carriers, by such contracts as may be agreed upon specially, the companies still remaining liable for gross negligence or willful misfeasance, against which good morals and public policy forbid they should be permitted to stipulate. Ibid, 484.

3. *Of the character of such endorsement, as a contract or notice.* The endorsement upon the back of this pass was not a mere notice, like the one in *Newhall's* case, 24 Ill., 466; the free ticket was a gratuity and the acceptance and use of it established the endorsement thereon as an agreement between the party giving and the party receiving. By using the ticket, the passenger assents to the terms on which it was given, and it becomes, to all intents and purposes, an agreement. Ibid, 484.

LIABILITY FOR ACTS OF AGENTS. See CORPORATIONS, 1, 2.

REAL AND PERSONAL ESTATE.

WHEN LANDS ASSUME THESE DISTINCTIVE CHARACTERS.

1. Where real estate is purchased by several, and procured to be conveyed to one of the number to be held by him in trust for all, for purposes of speculation and sale, upon such terms that the *cestuis que trust* have only a right to the proceeds thus arising, the right of the *cestuis que trust* is a personal right — the property is personal property.

But if the trustee thus holding the title convey the property to others of the beneficiaries, by consent of all, simply as "trustees," without declaring any specific trust, the effect of such conveyance will be to create a naked trust, vesting the legal title in the grantees to hold simply for the use of the *cestuis que trust*, and subject to a demand by them at any time for a conveyance. The property thus becomes reconverted into its original character of real estate, creating in the *cestuis que trust* an equitable estate of inheritance. *Nicoll* v. *Miller et al.*, 387.

2. MR. JUSTICE LAWRENCE dissents from the conclusion arrived at by a majority of the court in this case, holding that under the testimony of a witness, taken in connection with the conveyance from the original trustee

REAL AND PERSONAL ESTATE—*Continued.*

and the subsequent declarations of a specific trust, all those instruments should be regarded as one, thus preserving the character of the trust as originally created, and the condition of the property as personalty. Ibid, 387.

RECEIPT.

MAY BE EXPLAINED OR CONTRADICTED BY PAROL. See EVIDENCE, 7, 8.

RECORD.

TO THE SUPREME COURT.

What must be brought into the record by bill of exceptions. See BILLS OF EXCEPTIONS, 2, 3, 4.

RECORDING ACT.

UNRECORDED INSTRUMENTS.

Effect upon judgment lien, when the evidence of the title to the land is not recorded. See LIEN, 6.

RECOUPMENT.

WHEN ALLOWABLE.

In case of damages arising out of the subject matter of the suit. See SET OFF, 1, 2.

AS BETWEEN LANDLORD AND TENANT.

When landlord fails to repair as he agreed—damages resulting therefrom may be recouped against the rent. See LANDLORD AND TENANT, 2.

REDEMPTION.

FROM A VOID TAX SALE.

Not necessary, and cannot be required by law. See TAXES AND TAX SALES, 6.

BY ONE CREDITOR FROM ANOTHER.

When allowed in equity. See CHANCERY, 5.

RE-HEARING.

IN CHANCERY.

Is discretionary. See CHANCERY, 3.

RELEASE.

REQUIRES NO SEAL. See SEAL, 1.

TO RESTORE THE COMPETENCY OF A WITNESS.

If fraudulent, does not vitiate. See WITNESS, 8.

RENTS. See LANDLORD AND TENANT.

REPLEVIN.

WHETHER IT WILL LIE AS BETWEEN PARTNERS.

1. In an action of replevin, where the issues are non-detinet, not property of the plaintiff, and property in the defendant and the fact of a partnership between the plaintiff and defendant is evolved on the trial, it is erroneous to dismiss the cause, on motion of the defendant, for want of jurisdiction. Such evidence should go to the jury, and would, perhaps, have determined the first issue for the defendant. *Belcher et al.* v. *Van Duzen*, 281.

2. Although it might be that a partnership existed between the parties to the suit, still, the plaintiff may have had the exclusive right to the immediate possession of the property in dispute. Ibid, 281.

ASSIGNEE OF A CHATTEL MORTGAGE.

May maintain the action. See CHATTEL MORTGAGES, 4.

RIGHT OF ACTION.

OF ITS EXTINGUISHMENT. See EXTINGUISHMENT.

RULE OF COURT.

TO PRODUCE PAPERS.

What is a sufficient answer thereto. See PRACTICE, 8.

SALES.

SALE OF PERSONAL PROPERTY.

1. *What constitutes.* A father being at the point of death on a barge loaded with lumber belonging to him, gave to his son, who was with him, a bill of sale of the lumber, and directed him, in the instrument, to pay from the proceeds of the lumber a balance due to the persons from whom it was purchased. The son was of age and the father was to some extent indebted to him. *Held*, no fraud being shown, that the administratrix of the father acquired no title to the lumber by her letters of administration. *Wells et al.* v. *Miller*, 276.

2. *When made to different persons, who has title.* If there be two valid sales of personal property to different persons, he who first lawfully, and without committing a trespass or tort, obtains the possession, has the better title. *Walker et al.* v. *Collier et al.*, 362.

Secret liens not allowable. See FRAUD.

JUDICIAL SALES.

3. *Inadequacy of price.* Land was sold under a decree at about two-thirds its value; and it was *held*, that while such inadequacy of price would not, alone, be ground to set aside the sale, yet it would have its weight when considered with other evidence, in preventing an approval of the Master's report of the sale. *Sowards* v. *Pritchett*, 517.

4. *Action thereon — discretion of the court.* It is the cherished object of the courts to give stability to judicial sales, and at the same time protect the rights of the owner. In this the Chancellor has a large discretion, which will only be interfered with by the appellate court when it appears from all the circumstances that wrong or injustice has been done. *Sowards* v. *Pritchett*, 517.

SEAL.

WHEN NOT NECESSARY.

1. *To a release.* It has been held that a release of a debt secured by mortgage need not be under seal, *a fortiori*, it need not be, when prospective damages are released, as in this case. *Illinois Central Railroad Co.* v. *Read*, 484.

SET OFF.

AT LAW.

1. In an action by an agent against his principal, to recover compensation for services, the latter may set off any damages he may have incurred in consequence of any action of the agent in reference to the subject matter of his agency, after his authority ceased. *McEwen* v. *Kerfoot*, 530.

IN EQUITY.

2. *When allowed.* An agent for the purpose of procuring subscription to the stock of a railway company, upon taking from a subscriber a note for his stock, secured by a mortgage, gave to him an instrument by which the company guaranteed him against loss upon his stock. The agent was authorized by the board of directors to execute such an instrument. After the stock became entirely worthless, on bill to foreclose the mortgage, the defendant filed an answer and a cross-bill, setting up these facts, and praying a cancellation of the notes and mortgage. *Held*, that the defense was allowable, on the ground of recoupment of damages or equitable set off. *Peck* v. *Bligh et al.*, 317.

SHERIFF.

WHEN LIABLE FOR TRESPASS. See TRESPASS, 1.

SPECIFIC PERFORMANCE. See CHANCERY, 6, 7.

STATUTES.

CONSTRUCTION OF PARTICULAR STATUTES.

Act of 1861, *on the subject of notice to quit, as between landlord and tenant.* See LANDLORD AND TENANT, 5.

Act of 1861, *concerning appeals from justices.* See APPEALS, 3.

Act of 1865, *concerning the keeping of indices to court records, and the fees allowed therefor.* See FEES, 1.

Acts of 1845 *and* 1849, *concerning usury.* See ASSIGNMENT, 8.

Statutes in relation to widow's separate allowance. See WIDOW, 1, 2.

Act of 1861, *concerning products of the wife's land when cultivated by the husband.* See MARRIED WOMEN, 1.

Act of 21*st of February*, 1861, *curative of illegal tax sales, cannot be given a retrospective operation.* See CONSTITUTIONAL LAW, 3.

SUBSEQUENT GRANTEE.

LIABILITY FOR PRIOR INCUMBRANCES. See PURCHASER, 1, 2, 3, 4.

SWAMP AND OVERFLOWED LANDS.

ARE UNDER THE EXCLUSIVE CONTROL OF THE COUNTIES.

1. It was the intention of the General Assembly, under the various acts on this subject, to grant to the several counties in the State, the swamp and overflowed lands within their respective limits, and to remit to such counties the exclusive control over these lands and over their proceeds. *Newell et al.* v. *Supervisors of Bureau County*, 253.

COUNTIES NOT OBLIGED TO RECLAIM THE LANDS.

2. No plea of want of consideration can be sustained to a note given for a portion of these lands, on the ground that the lands have not been reclaimed, and a system of drainage established and carried out. Ibid, 253.

SWORN ANSWERS IN CHANCERY.

DEGREE OF EVIDENCE REQUIRED TO OVERCOME THEM. See PLEADING AND EVIDENCE, 7.

TAXES AND TAX SALES.

ILLEGAL SALE OF LAND FOR TAXES

1. *Relative rights of owner and purchaser.* An owner of land incurs no forfeiture, by permitting his land to pass to sale for taxes, if the sale is not legally conducted. It devolves upon the purchaser to see, that all the requirements of the law have been observed, if he expects to acquire title at a tax sale. *Conway* v. *Cable et al.*, 82.

2. *What constitutes an illegal sale.* Where the officers conducting a tax sale make an agreement with purchasers to receive a portion only of the taxes due, at the sale, such agreement is illegal, and a sale under the agreement is also illegal. Ibid, 82.

3. *Curative legislation, unconstitutional.* Such a sale is not rendered valid by a subsequent law declaring the agreement and sale valid and binding. Ibid, 82.

4. Where the officers conducting a tax sale omit essential acts, rendering it invalid, the legislature are powerless to cure the defect, and render the sale valid. Ibid, 82.

5. *Curative act of* 1861, *cannot have a retrospective operation.* The act of 21st of February, 1861, declaring that certain defenses shall not be made to tax deeds executed after the adoption of the law, until the redemption money is tendered, does not operate upon sales made before its passage, but, if at all, only on subsequent tax sales. Ibid, 82.

6. *Redemption cannot be required from an illegal sale.* The legislature has no power, where an individual has permitted his land to pass to a void sale for taxes, to enact that he shall not be allowed to assert his paramount title, as a defense against a tax title acquired at such a sale, without paying the redemption money. *Conway* v. *Cable et al.*, 82.

FALSE RETURN OF PERSONAL PROPERTY.

7. *Presumption as to the action of the assessor in imposing the pen-*

TAXES AND TAX SALES—*Continued.*

alty, etc. An assessor for taxes, being of opinion that a resident of his township had made a false return both of his own personal property and of that belonging to an unsettled estate of which he was executor, largely increased the valuations, and then affixed the penalty provided by the Statute for a false return, by doubling the increased valuations. The owner of the property was notified of these proceedings, and of the time and place of meeting of the board for the correction of lists. He appeared before the board, but refused to make the affidavit required by the Statute as to the true value of his property. The board did not interfere, and he then filed a bill to enjoin the collection of the taxes, but did not aver in his bill, nor prove, upon hearing, that the valuation affixed by the assessor was too high. *Held*, that the action of the officer, proceeding within the scope of his official authority, must be presumed to have been correct, until the contrary is duly alleged and proven — that this was not a case calling for the interference of the court, so far as related to the increased valuation of the personal property, whether belonging to the complainant in his own right or to the estate. Nor would the court interfere with the penalty affixed to the personal property held by the complainant in his own right. *Leper* v. *Pulsifer*, 110.

8. *Penalty not to be enforced against an estate.* But the assessor had no power, under the Statute, to double the true valuation of the property belonging to the estate, in consequence of fraud in the executor. Ibid, 110.

9. *Nor does the penalty apply to real estate.* Nor had he any right to double the valuation of any real estate which might be listed in the name of the complainant. Ibid, 110.

TENANCY.

From year to year.

What constitutes. See LANDLORD AND TENANT, 6.

TIME.

Fraction of a day.

1. *When regarded.* While, for many purposes, the law knows no division of a day, yet whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into the fractions of a day as readily as into the fractions of any other unit of time. *Grosvenor et al.* v. *Magill & Latham*, 239.

2. When parties contract for the performance of an act during the first half of any month containing thirty-one days, they contract that it shall be performed by noon of the sixteenth day. Ibid, 239.

TITLE.

Cloud upon title.

What constitutes, and when chancery will interpose to remove it. See CHANCERY, 8, 9.

TRESPASS.

De bonis asportatis.

1. *Against an officer.* Where there has been a *bona fide* sale and delivery of goods by the owner to one of his creditors, in payment of a debt, and the goods are afterwards taken by the sheriff, under writs of attachment sued out by other creditors of the vendor, the vendee may maintain trespass against the sheriff. *Hessing* v. *McCloskey*, 341.

Of the measure of damages, in such case. See MEASURE OF DAMAGES, 3.

TRUSTS.

Where one of several trustees refuses to act.

1. *Its effect.* Where a conveyance is made to several, in trust, the failure of one of the co-trustees to act will not defeat the conveyance. *Nicoll* v. *Miller et al.*, 387.

TRUSTS—*Continued.*

2. *Equity will preserve the trust.* In such a case, equity will entertain jurisdiction for the purpose of preserving the trust. Ibid, 387.

UNITED STATES LANDS. See GOVERNMENT LANDS.

USURY.

WHO MAY PLEAD USURY.

1. In a contest between two creditors as to the proceeds of a security held for the benefit of both, one creditor cannot raise against the other the question of usury in behalf of the debtor. The debtor must assert his own rights. *Adams et al.* v. *Robertson et al.*, 45.

WHETHER LEGAL INTEREST IS RECOVERABLE.

2. *Usury being established.* In a suit to foreclose a mortgage tainted with usury, a forfeiture of all interest is the necessary consequence. And in such a case, a decree giving the mortgagee legal interest is erroneous. *Snyder* v. *Griswold*, 216.

3. If, however, the mortgagor was seeking relief against a usurious mortgage, then the court could require him to pay legal interest, on the principle that he who asks equitable relief, should do equity, and equity would require him to pay legal interest. In such case, a court of equity could prescribe the terms of its interference. Ibid, 216.

USURY CANNOT BE RECOVERED BACK

4. *But may be deducted from an unpaid balance.* While it is the rule of this court that usurious interest once paid voluntarily, cannot be recovered back, yet that rule does not apply where the transaction has not been settled, and the lender brings his action for the recovery of an alleged balance. In such case the borrower may defend by claiming a credit for whatever usurious interest he has paid in the same transaction. The fact that new notes have, from time, been given, does not change the case. *Saylor et al.* v. *Daniels*, 331.

5. Where usurious interest has been voluntarily paid by a debtor to his creditor, it cannot be recovered back. *Town* v. *Wood*, 512.

6. But where a party has paid to another, money, a portion of which was usurious interest, and afterwards sues to recover the sum paid, in an action for money had and received, upon the ground that the consideration upon which it was received had wholly failed, he may recover the entire sum. In such case, the plaintiff does not recover back the usurious interest because it was usurious, but he merely recovers back whatever of principal and interest he has paid, because the consideration upon which it was received has wholly failed. Ibid, 512.

ALLEGATIONS OF USURY.

Should not be general. See CHANCERY, 1.

ASSIGNEE OF NOTE TAINTED WITH USURY.

Of his rights. See ASSIGNMENT, 6, 7, 8.

VENDOR'S LIEN. See LIEN, 1, 2, 3, 4, 5.

VENDOR AND PURCHASER.

CONTRACT TO CONVEY, WITH WARRANTY.

1. *Rights of purchaser, on failure of vendor's title.* Where the vendor of land, having only an inchoate title, agrees in his contract of sale to convey "all his right, title and interest, with full covenants of warranty," he is at least bound to keep good and convey such estate as he had at the time of making sale. He can neither convey it to another, nor forfeit it by his own *laches* without discharging his vendee from all obligation to accept and pay for a barren deed. *Lull et al.* v. *Stone*, 224.

WHEN THE VENDEE OF LAND MAY COMPEL A CONVEYANCE. See CHANCERY, 6.

VENDOR AND PURCHASER—*Continued.*

RIGHTS OF SUBSEQUENT PURCHASER FROM VENDEE. Same title, 7.

SUBSEQUENT DECLARATIONS AND ACTS OF VENDOR.
Cannot prejudice vendee's title. See EVIDENCE, 15.

OF ENTRIES OF GOVERNMENT LANDS.
Power of the government to vacate them, and rights of the purchaser. See GOVERNMENT LANDS.

VENUE.

MAY BE CHANGED BY CONSENT.
The venue in all cases can be changed by consent, without a petition to the court. *Pierson et al.* v *Finney*, 29.

VERDICT.

PRESUMPTION AS TO ITS EXTENT.
1. *As to the value of property.* One of two joint owners of a mowing and reaping machine, sued the other in trover, claiming the entire machine to be his. The plaintiff obtained a verdict, but from the conflicting evidence as to the value of the machine, it could not be said whether the jury considered themselves as finding the value of the whole or only one-half. From the mode, however, in which the plaintiff submitted his case, claiming the whole machine, it was held proper to presume that the verdict was for the entire machine. *Swartwout* v. *Evans*, 442.

SURPLUSAGE WILL NOT VITIATE.
2. In a prosecution of a party for administering drugs to a woman then pregnant with child, with intent to produce a miscarriage, the jury found the defendant guilty, and fixed his term of imprisonment in the penitentiary, "together with a fine of one hundred dollars." The jury were not authorized under the law to fix any fine, yet the attempt thus to do so did not vitiate the verdict; that portion of it was rejected as surplusage. *Armstrong* v. *The People*, 459.

GENERAL VERDICT OF "GUILTY."
3. *Is sufficient.* A general verdict of "guilty" is sufficient, without specifying of what offense, either by description, by reference to the indictment, or otherwise. It is understood to mean, guilty of the offense charged in the indictment. Ibid, 459.

VERDICT UPON SEVERAL COUNTS.
4. It is no matter how many counts an indictment may contain, a general verdict of guilty is a finding upon all of them. Ibid, 459.

VOID AND VOIDABLE.

WHEN A DECREE IS VOID.
1. While a decree authorizing an executor to sell lands to pay debts would be erroneous, when the names of the heirs do not appear in the petition or any part of the record, yet that is not essential to the jurisdiction of the court. *Morris et al.* v. *Hogle et al.*, 150.
2. But where the decree is rendered without any notice having been given of the application, it is void. Ibid, 150.

DESCRIPTION OF PROPERTY LEVIED ON.
When void for uncertainty. See LEVY, 2.
Effect thereof, as a cloud upon title. See CHANCERY, 9.

WAIVER.

OF VENDOR'S LIEN. See LIEN, 2, 3, 4.

WARRANTY.

CONTRACT TO CONVEY, WITH WARRANTY.
Rights of purchaser, on failure of vendor's title. See VENDOR AND PURCHASER, 1.

WIDOW.

Of her separate property, under the statute of wills.

1. *Need not renounce the will.* The right of a widow to her separate personal property, under the 48th section of the statute of wills, is not affected by her failing to renounce the benefits of a will in which land was devised to her by her husband. *Deltzer et al.* v. *Scheuster*, 301.

2. *Construction of statutes in relation thereto.* Section 10, of chapter 34, of the Revised Statutes, must be construed to apply to other "personal estate" than that set apart to her under the 48th section of the chapter of wills. Ibid, 301.

3. *How the separate allowance to be raised.* Although the widow is to be considered a creditor of the estate to the extent of her separate allowance, and entitled to have the real estate sold for its payment, yet if the will of the husband devise separate parcels of real estate to her and to his children, the fund for the payment of her allowance should not be raised exclusively from the estate devised to the children, but should be apportioned between that and the estate devised to her, according to their respective values. *Deltzer et al.* v. *Scheuster*, 301.

4. *Disposition of the homestead.* In apportioning the burden between the widow and children, the homestead, being in the occupancy of the widow, but devised to the children, should not be taken into the account or ordered to be sold. Ibid, 301.

WILLS.

Construction thereof.

1. *Effect of words of limitation upon a prior devise in fee.* A will contained this clause, "I give and bequeath to my beloved wife, Antonia, all my real and personal estate, wherever situated, in fee simple absolute forever, that is to say, — that my said wife shall have all of the benefits thereof, until the expiration of her life, at which time my son, Anton, shall be the only heir of real or personal estate, what may be left." *Held*, that the wife took only an estate for life in the real estate, and remainder in fee to the son. *Siegwald* v. *Siegwald*, 430.

2. This is not like a case of a devise in fee, with a power of sale, and a subsequent limitation over; but in this case, the testator not only makes an executory devise of the estate at the death of his wife, to his son, but he expressly limits the enjoyment of the property to her benefit until the termination of her life. She is given no power of sale of the real estate. Ibid, 430.

3. Had this been a deed, there can be no question that the limitation would have been void, as repugnant to the fee previously granted. Ibid, 430.

4. It is a plain and primary rule that a fee cannot be limited upon a fee, by deed, but may be by an executory devise. Ibid, 430.

WITNESS.

Competency.

1. *Interest.* The clerk of a party to whom a package of money was sent by express, receipted for the package, supposing at the time he was receipting for some other articles, and did not in fact receive the money package. The loss of the money being discovered, and also that the clerk had receipted for it, his father, upon being apprised of the facts, voluntarily paid to the owner the amount of the loss. In a suit subsequently brought by such owner against the express company to recover the money lost, his clerk was held to be a competent witness in his behalf, to prove that the money was not received. His liability to the plaintiff was discharged, and he assumed none to his father who paid the money voluntarily. *American Express Co.* v. *Haggard*, 465.

2. A grantor in a deed containing covenants for title, is not a competent witness on behalf of the plaintiff in ejectment, who relies upon the deed,

WITNESS—*Continued.*

to prove its execution. He has a disqualifying interest in the result of the suit. *Hamilton* v. *Doolittle et al.*, 473.

3. In such a case, the grantor would not be called against his interest: it would be to his interest to maintain the title which he had covenanted to make good. Ibid, 473.

4. Such a grantor is, for the same reason, incompetent to prove that he gave notice to a subsequent purchaser that he had already sold and conveyed the land to another person. Ibid, 473.

5. In an action by a mortgagor against his mortgagee, to recover back money paid upon the mortgage, upon the ground of a failure of the consideration of the mortgage, a subsequent purchaser from the mortgagor, who had sold the premises to the mortgagee, and taken the mortgage as a part payment therefor, is a competent witness for the plaintiff. He has no interest in the result of the suit. *Town* v. *Wood*, 512.

6. In an action of replevin, by the agent of the mortgagee of personal property, levied upon under execution, by a creditor of the agent, as his property, the mortgagee is not, as between the agent and the creditor, a competent witness for the former. A recovery by the agent, is, in effect, a recovery by the mortgagee, and he will not be permitted to testify in his own favor. *Sherman* v. *Bruce*, 39.

7. *In what mode his interest may be shown.* A witness who is objected to, because of an interest in the event of the suit, may be examined on his *voir dire*, or his interest may be shown by witnesses, but resort cannot be had to both modes. *Walker et al.* v. *Collier et al.*, 363.

8. *A release to restore competency, though fraudulent, is good for that purpose.* If the release executed to render a witness competent be fraudulent, it is, nevertheless, valid and binding between the parties to it, and when it is produced, a witness cannot be examined to show it is fraudulent. Ibid, 363.

IMPEACHMENT.

9. It is error to tell the jury if a witness has sworn falsely in one particular, his whole testimony must be rejected, for he may, in other portions of his testimony, be corroborated. *Blanchard et al. v. Pratt*, 243.

WRIT OF ASSISTANCE.

WHEN IT WILL ISSUE, AND WHEN NOT.

Only against a party or one coming in pendente lite. A writ of assistance will not issue against a person in possession of premises sold under a decree rendered in a suit to which he was not a party, if his possession began before the commencement of the suit. Not being a party, nor coming in *pendente lite*, his rights are in no way affected by the suit, and will not be adjudicated in a summary manner upon motion for a writ. *Gilcreest* v. *Magill*, 300.

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